

OPINIONS/

OF THE

Corporation Counsel and
Assistants

FROM

JANUARY 1, 1913, TO OCTOBER 5, 1914.

PUBLISHED BY AUTHORITY OF THE
CITY COUNCIL
OF THE CITY OF CHICAGO

Compiled and Edited by
WILLIAM H. SEXTON
Corporation Counsel



PREFACE.

The first volume of "Opinions of the Corporation Counsel and Assistants" published in book form in the year 1897 under the supervision of William G. Beale, Esq., then corporation counsel, contains the opinions rendered under his administration and also those opinions then preserved in the records of the office of the corporation counsel from the time of the Chicago fire.

The second volume of opinions was compiled by Edgar Bronson Tolman, Esq., corporation counsel, and contained carefully selected opinions of the law department from April 5, 1897, to April 10, 1905, thereby also including the opinions rendered during the four years incumbency of Charles M. Walker, Esq.

The third and fourth volumes of opinions were compiled by Edward J. Brundage, Esq., corporation counsel, and covered the period from April 15, 1907, to April 1, 1911.

It is unfortunate that the opinions rendered during the incumbency of Hon. James Hamilton Lewis, corporation counsel, from July 10, 1905, to April 15, 1907, were not published in book form. I sincerely trust that his opinions will be published in the near future.

The opinions contained in this volume were selected by Mr. John W. Beckwith, First Assistant Corporation Counsel, and Mr. Leon Hornstein, Assistant Corporation Counsel.

The publication of this volume has been supervised by Mr. Loring R. Hoover, Assistant Corporation Counsel. To this duty he brought the same intelligence and great industry which has characterized all his work in the law department.

I hope this compilation of opinions will be as useful as those prepared by my distinguished predecessors.

Chicago, October 5, 1914.

WM. H. SEXTON,
Corporation Counsel.

PRESS OF BARNARD & MILLER
172 N. LA SALLE ST., CHICAGO



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OPINIONS

OF THE

Corporation Counsel and Assistants

FROM

JANUARY 1, 1913, TO OCTOBER 5, 1914.

JANUARY 3, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

On October 26th the Supreme Court of this state handed down an opinion in the case of *People ex rel. Mrs. D. Fitzgerald v. Carter H. Harrison, Mayor*, involving the validity of Sections 2 and 3 of the ordinance passed by the City Council of the City of Chicago, June 25th, 1906 (C. P., pp. 989-990), which sections limit the number of dram shop licenses to be issued in the City of Chicago and give the right of renewal of such licenses to the licensees or their assignees.

The opinion in the case referred to concludes as follows:

"The ordinance is valid in so far as it limits the number of licenses that may be issued, but invalid so far as it attempts to give a right of renewal to the licensee or his assignee. Where there are more applicants for license than licenses to be issued, as the record here shows, a reasonable discretion is reserved to the mayor to determine to whom the license shall issue."

A petition for rehearing was duly filed by this department, on behalf of the Mayor. Said petition was denied December 5, 1912, and the decision of the Supreme Court is now final. The case referred to is reported in Volume 256 of Illinois Reports, at page 102.

Sections 2 and 3, above referred to, were incorporated in the Chicago Code of 1911 as Sections 1528 and 1529, respectively.

Said Section 1529 of the Code was amended by an ordinance passed July 17, 1911 (C. P., p. 1104). The amendment merely makes additional provisions in respect to assigning the right to renewal of licenses, and the Supreme Court decision holding Sections 2 and 3 invalid in so far as they attempt to give a right to renewal to the licensee or his assignee applies with equal force to Section 1528 of the Code and Section 1529 as amended as aforesaid.

The effect of the Supreme Court decision is to make invalid all of the provisions of the dram shop ordinance in respect to the right of renewal.

It will be observed that the Supreme Court holds the ordinance valid in so far as it limits the number of licenses that may be issued. The ordinance contemplated and provided for the reissuance of licenses only to persons owning licenses on July 31, 1906, and assignees of said licensees' supposed right of renewal, and only so long as the license in each case should have been kept in force continuously and uninterruptedly in the name of the licensee or his successor in interest, and licenses have been issued accordingly ever since July 31, 1906.

The Supreme Court now holds that neither the licensee nor his assignee has or ever had any right of renewal.

The decision of the court leaves the dram shop ordinance in such confusion that it cannot be said with certainty what is now the number of licenses which the city can lawfully issue at this time, that is, whether the maximum number would be the number of licenses which were in force July 31, 1906 (which the City Collector reports to be 7,353), or the number now in force (which the City Collector reports to be 7,152), or the number of licenses now held by persons who were the owners of licenses on July 31, 1906, and have continuously held licenses since that time.

Many inquiries are being received from saloon keepers and other interested persons concerning the issuance of licenses for the period beginning May 1, 1913.

Under the circumstances we suggest the advisability of passing an ordinance fixing the number of licenses to be issued on the basis of population or otherwise, or entirely removing the limitation as to the number of licenses, thus reverting to the condition in this respect which obtained prior to the passage of the so-called Harkin ordinance.

If desired, we will be pleased to draft an ordinance to meet your wishes in this matter.

Yours respectfully,
BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

JANUARY 3, 1913.

HON. RAY PALMER, City Electrician.

Dear Sir:

Replying to your request of December 24, 1912, for an opinion as to whether your department has jurisdiction over the electrical wires and apparatus to be installed in the new Ridge Park at Longwood Drive and 97th street and in the smaller parks, I beg to reply as follows:

First. The Ridge Park is organized under "An Act to provide for the organization of park districts and the transfer of submerged lands to those bordering on navigable bodies of water" approved June 24, 1895.

Section 11 of said act setting forth the powers of the commissioners of said park is in part as follows:

"The commissioners elected in any park district organized under this act shall constitute the corporate authorities of such district and a majority thereof shall constitute a quorum at any meeting thereof. They shall have power to pass all necessary ordinances, rules and regulations for the proper management and conduct of the business of said board and of said corporation and for carrying into effect the objects for which said park district is formed. *They shall have full power to manage and control all the officers and property of said district and all parks, boulevards and driveways maintained by such park district or committed to its care and custody.*"

* * *

In addition to the above enumerated powers, said park district has power to organize and maintain a police force and to levy special assessments.

The legislature of the state has full power and authority to create municipal corporations such as the park district above referred to and within the scope of the powers granted to such park district as above enumerated. I am of the opinion that the park commissioners and the officials of the City of Chicago do not have concurrent authority within the parks controlled by said board but that the park commissioners have exclusive authority within the scope of powers as above set forth and enumerated.

McCormick v. South Park Commissioners, 150 Ill. 516.

West Chicago Park Commissioners v. Chicago, 152 Ill. 392.

The question then to be answered is: Does the park district have jurisdiction over electrical wires and apparatus installed and to be installed?

The act sets forth that "they shall have full power to manage and control all the officers and property of said district and all parks, boulevards and driveways maintained by such park district or committed to its care and custody." I conclude that full power to manage and control all property is broad enough to include jurisdiction over electrical wires and apparatus.

In the McCormick case, *supra*, the City of Chicago by ordinance granted to the South Park Commissioners the power "to take, regulate, control and improve Michigan avenue, extending from the south line of Jackson street to the south line of 35th street." A property owner on Michigan avenue applied for a permit from the park board to construct a balcony sixteen feet above the surface of the street and projecting out over the lot line about six feet. His application was refused and he then applied to the City Council of Chicago for a license to construct such balcony, which was granted. In deciding the case the court says:

"The question presented upon this record is, whether the construction of the balcony in question was a matter over which the South Park Commissioners had jurisdic-

tion and control. If they had it cannot we think be seriously questioned that they were authorized to forbid and prevent the erection thereof and that the city had no authority in the premises, so far as pertained to Michigan avenue between the south lines of Jackson and Thirty-fifth streets, for it could scarcely be contended in the absence of the contrary appearing, that the legislature intended to make the powers of the park commissioners and the city authorities in respect of subjects matter within the control of either, contemporaneous and co-equal, and thus create dual governments. In the case of conflict as here the right of control belongs to the one or the other,—not to both. Concurrent powers where they exist must be of such nature that they can be possessed and exercised without conflict, or the possession and exercise by the one must exclude the like possession and exercise by the other. It is not pretended that the powers of the park commissioners and of the city authorities of the City of Chicago are concurrent. On the contrary, the contention is sharp that on the one hand it is a matter exclusively within the control of the city authorities and on the other that of the park commissioners.”

Section 13 of the act by which the South Park Commissioners was created is in part as follows:

“The said board shall have the full and exclusive power to govern, manage and direct said park; to lay out and regulate the same; to pass ordinances for the regulation and government thereof;” * * *

Under this grant of power by the legislature and the aforesaid ordinance by the City of Chicago turning over Michigan avenue to said park board, the court held that the South Park Commissioners had jurisdiction. In the present instance as well as in the McCormick case, the question for decision is a matter of building regulation and I am of the opinion that the language of Section 11 above quoted, to wit, “Full power to manage and control all property of said district,” is broad enough to include jurisdiction over electrical wires and apparatus.

In the case of *Kentucky Institution for Education of Blind v. City of Louisville et al.*, 8 L. R. A. (N. S.), 553, it was held that the general police power conferred upon a municipality does not include power to compel the placing of fire escapes on an eleemosynary institution for the blind which

belongs to and is entirely under the control and management of the state, and while a park district is not upon the same footing with a state, its corporate municipal existence and the scope of power under which the Ridge Park district is organized is sufficiently distinct and comprehensive in its scope as to admit of the application of the doctrine laid down in the Kentucky case.

Second. As to jurisdiction over electrical wires and apparatus installed in the smaller parks, I can only say that this depends upon the scope of the statutes under which such parks are organized and maintained. If organized under legislative acts granting powers as broad as the act of June 24, 1895, the jurisdiction would be in the park board.

Respectfully submitted,

JAMES G. SKINNER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 10, 1913.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

You request the opinion of this department as to what effect, if any, the suit of *Kucharski v. the City* has upon a recent payment by you to M. L. C. Funkhouser, Second Deputy Superintendent of Police, for services of employes in his division during the month of December, and also the effect, if any, of this pending litigation upon your authority to make future payments to Mr. Funkhouser for the "purpose of defraying expenses of his division."

It may not be inadvisable, in view of your inquiry, to state the objects sought to be enforced by the litigation above referred to.

Kucharski, representing himself to be a citizen and taxpayer of the City of Chicago, filed a bill upon January 2, 1912, in the Circuit Court of this county, being general number B-23, against the Mayor, yourself, the Treasurer, the Commissioners of Civil Service, Metellus L. C. Funkhouser, Second

Deputy Superintendent of Police, and William C. Dannenberg, Inspector of Moral Conditions, of the city, one of his contentions being that, under Section 454 of Chapter 24 of the Illinois statutes (Section 9 of the Civil Service Act), which provides that:

"The commission shall, by its rules, provide for promotions in such classified service, on the basis of ascertained merit and seniority in service and examination and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion,"

the examinations held for the positions of Second Deputy Superintendent of Police and Inspector of Moral Conditions, respectively, should have been made promotional examinations, whereas, in fact, such examinations were not promotional in their character but original examinations.

It follows, according to his contention, that the officers now holding the positions above mentioned did not secure them through a legal examination, and, consequently, are occupying said offices unrightfully.

He further alleges that on December 30, 1912, the City Council passed certain police reorganization ordinances and, subsequently, amendments thereto, creating the *offices* of Second Deputy Superintendent of Police and Inspector of Moral Conditions, which ordinances provided that neither of the two officers above mentioned should be members of the Police Department; that these ordinances, in so far as they provide that these two officers shall not be members of the Police Department, are contrary to the law and void.

The prayer of the bill is directed toward the restraint of the disbursing officers of the city in payment or authorization of payment of any salaries to the two officers in question, and also the restraint of said officers from receiving any compensation in their positions.

The return day is the third Monday in January, 1914, and no injunction, preliminary or final, has been moved for by the complainant.

Irrespective of the merits of complainant's proposition that the examination held by the Civil Service Commission for filling the positions in question was illegal, I am of the opinion that the offices of Second Deputy Superintendent of

Police and Inspector of Moral Conditions were legally created by the City Council through the passage of the ordinance hereinabove referred to.

Without entering into a voluminous explanation of my reasons for so holding, let it suffice to say that the power of the City Council, in creating offices necessary and convenient for the public welfare, is expressly given under Article VI of the Cities and Villages Act, and it is well within the discretion of the council to provide that these offices shall not be filled from the active police force.

While I have taken the view above announced, yet, if the question be regarded as fairly debatable, I still can entertain no doubt as to the legal *existence of the offices* even though the class of persons designated as future incumbents be limited to persons outside of the active police department. Holding, therefore, as I have, that the offices are legally created, the question arises whether the incumbents now filling these offices and discharging their duties were rightfully appointed and are legally discharging the functions of the positions.

This is a question which will arise at the threshold of the controversy in the Circuit Court and, in the view I have taken of the case, it is unnecessary to discuss it at this time.

If we admit that the offices are legally created, the fact that the officers may not have been legally appointed makes no difference with respect to your responsibility in the payment of salaries of these officers. They have at least a claim under a color of appointment and, having such a claim, they are in contemplation of law *de facto* officers.

A *de facto* officer has been defined by Lord Ellenborough in *Rex v. Bedford Level*, 6 East 356, as:

“One who has the reputation of being the officer he assumes to be and yet not a good officer in point of law.”

This definition, including as it does, the necessity for color of appointment, is upheld by a majority of cases in so far as the rights of third persons are concerned. This definition is supported by:

Mechem on Public Officers, §317;

State v. Carroll, 38 Conn. 449;

People v. Lieb, 85 Ill. 484.

Brown v. Lunt, 37 Me. 428.

Some of the cases go further, and even hold that though the organic law giving the power of appointment be unconstitutional, yet an appointment thereunder is sufficient to give color and create an officer *de facto*. Thus, in *ex parte Strang*, 21 Ohio St. 610, the court went to the extent of holding that:

“The true doctrine seems to be that it is sufficient if the officer holds the office under some power having color of authority to appoint, and that a statute, though it should be found repugnant to the Constitution, will give color.”

In the *Lieb* case, above cited, this exposition of the doctrine is upheld in the following language:

“To constitute an officer *de facto* it is not necessary that he should derive his appointment from one competent to invest him with a good title to the office.”

And in support of this are:

Fowler v. Beebe, 9 Mass. 232;

Conover v. Fowler, 10 *id.* 291.

Having established, as we apprehend, the premise that Funkhouser and his associate are *de facto* officers, we will next proceed to the minor premise that *de facto* officers are unassailable as to their compensation at the suit of a taxpayer.

On page 581 of Mr. High's work on Injunctions (the author whereof holds the highest position as a text-book writer), Mr. High says:

“Courts of equity will not interfere, by injunction, to determine questions concerning the appointment or election of public officers or their title to office, such questions being of a purely legal nature and cognizable only by courts of law.”

In the case of *Burgess v. Davis*, 138 Ill. 578, a bill was filed by a taxpayer against the County Treasurer and others to restrain the payment out of county funds of any salary due the late Judge Prendergast as county judge. The complainant raised the issue that Prendergast, having accepted the office of Sanitary District Trustee of the city, was in-

competent to fill the office of county judge, and that his acceptance was in effect a resignation of the office of judge, and, therefore, he was entitled to no salary for such position. The court, in denying the injunctive relief, lays down the rule that a court of equity will not enjoin a *de facto* incumbent of an office from performing his duties; that such result must be obtained in other proceedings, and that a court of equity will not interfere to enjoin the payment of fees, salaries or emoluments to a *de facto* incumbent of an office.

“Public policy will prevent the courts. (it is there said) from interfering to disturb a *de facto* officer in the receipts of the fees.” (Citing *Stone v. Wetmore*, 24 Ga. 601.)

If further authority were needed it can be found in *Lavin v. Commissioners of Cook County*, 245 Ill. 496, wherein the taxpayer sought to enjoin a payment to one Loesch, a special state's attorney, of his salary. The court held that being a *de facto* officer, equity would not either enjoin him from the performance of his duties of office or from receiving the salary appertaining thereto. While a dissenting opinion was filed in this case, it went only to the point that Loesch was exercising a temporary authority for a special occasion and fell within the constitutional definition of “an agency for a temporary purpose” and not that of an officer. The question on which the dissent arose is not present in this case, and under the facts here presented the case may be considered as an undivided opinion of the law by the Supreme Court of this state.

It having been established that the offices of Second Deputy Superintendent of Police and Inspector of Moral Conditions legally exists, and also that the incumbents of such offices are at least *de facto* officers, and as *de facto* officers cannot be interfered with in the enjoyment of their salaries by a court of equity, the conclusion logically follows that the officers in question are protected by law from any interference on the part of a taxpayer in a collateral proceeding whose object is to restrain the disbursing officers of the city in the payment of such salaries.

I am therefore of the opinion that you are protected

in law in the payment already made, and that such protection extends to future payments to the officers in question until order of court otherwise directing.

Yours respectfully,
JOHN W. BECKWITH,
First Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

JANUARY 10, 1913.

HON. JOHN McWEENY, General Superintendent of Police.

Dear Sir:

Your communication asking for an opinion as to what arrangements will have to be made so as to protect the city on the bond of Mr. DeWitt C. Cregier, custodian of lost or stolen property, while Mr. Cregier is absent from the city on a three months furlough and his duties are being performed by an acting custodian, received.

Section 1924 of the Code, which provides for the bond of the custodian, states that the bond shall be "conditioned on the faithful observance and performance of the duties of his office."

By ordinance passed on December 30, 1912 (Council Proceedings, page 3019, *et seq*), known as the Police Reorganization Ordinance, the custodian by Section 1916A is designated as "the custodian of lost and stolen property" and he is required to file bond in the sum of \$20,000.00 with such sureties as the City Council shall approve, conditioned upon the faithful performance of his office."

This latter ordinance will be in effect upon the publication, which will probably be before two weeks from this date.

I have examined the bond which Mr. Cregier gave on June 22, 1905, and I am of the opinion that it protects the city only in so far as Mr. Cregier himself is concerned and does not protect the city as regards acts of persons holding positions under him or acting as custodians during his absence.

I therefore suggest that the person who is to be acting custodian or custodian under temporary authority during Mr. Cregier's absence be required to furnish a bond for \$20,000.00 with sureties to be approved by the City Council and conditioned upon the faithful performance of the duties of custodian by him for the period of three months.

Very respectfully,
CRAWFORD ROSS,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

JANUARY 11, 1913.

HON. EDWARD COHEN, City Collector.

Dear Sir:

Replying to yours of January 2d, in which you ask whether a person who pays a license fee of \$1.00 for a coupe under Section 2555 and who drives the coupe himself, is also required to take out a driver's license under Section 2558 or whether a person who has a driver's license is also required to take out a coupe license, when he is himself the owner of the vehicle.

No mention is made in either section of any exception. To construe these ordinances as making exceptions would leave the whole ordinance open to the objection that it did not affect all persons alike and the ordinance would, therefore, be invalid. There ordinances should be considered revenue as well as regulative measures and under this construction, the coupe must pay a license and the driver must also pay a license regardless of whether he is the owner of the coupe or not.

Very respectfully,
GEO. L. REKER,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

JANUARY 14, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In your letter of the 10th instant you write:

"Please let me know at once what provisions there are in the Municipal Court Law giving judges authority to commit as well as to fine."

There is no power to commit offenders for violation of any of the city ordinances, excepting for the failure to pay the fine imposed.

In *People v. Glowacki*, 236 Ill. 612, the jurisdiction of the Municipal Court is settled to be:

"That under the constitution and the Municipal Court Act the Municipal Court of Chicago has jurisdiction to try, on information, all violations of criminal laws punishable by fine or by imprisonment otherwise than in the penitentiary, or by both fine and such imprisonment. If the offense is one that may be punished either by fine or by imprisonment in the penitentiary or both by fine and imprisonment in the penitentiary, then it can only be prosecuted under an indictment."

Briefly, some of the offenses for which the Municipal Court may imprison in the county jail not to exceed one year, are:

"Obtaining money or credit by false pretense;
Larceny, where the amount is under \$15.00;
Assault with deadly weapon."

Some of the cases in which fines only may be imposed are:

"Assault and battery;
Carrying deadly weapons;
Gambling;
Selling or possessing obscene books, etc."

The Municipal Court has no power to commit for the violation of more serious statutes, as for:

"Assault with intent to commit murder;
Murder;
Burglary;
Robbery; etc."

Yours respectfully,
GEO. L. REKER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 15, 1913.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

In reply to your inquiry of January 9th, we beg to advise you that the authority of the city with reference to the regulation of the rates of fare to be charged by steam railroads is necessarily confined to hauls from point to point within the city. That is to say, the city has no authority whatever to regulate the rate to be charged for transporting either persons or property from a point within the city to a point without the city, or from a point without the city to a point within the city.

The powers of the City Council, as contained in the Cities and Villages Act and upon which authority to pass an ordinance of the nature of that involved in your inquiry, may be predicated in whole or in part upon the following (Sec. 62, Ch. 24, Hurd's Rev. Statutes, 1911):

"The city council in cities, and the president and the board of trustees in villages, shall have the following powers:

Seventh. To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same.

Ninth. To regulate the use of the same.

Twentieth. To regulate traffic and sales upon the streets, sidewalks and public places.

Forty-second. To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen and all others pursuing like occupations, and to prescribe their compensation.

Sixty-sixth. To regulate the police of the city or village, and pass and enforce all necessary ordinances.

Ninetieth. The city council or board of trustees shall have no power to grant the use of or the right to lay down any railroad tracks in any street of the city to any steam, dummy, electric, cable, horse or other railroad company, whether the same shall be incorporated under any general or special law of the state, now or hereafter in force, except upon the petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be

used for railroad purposes, and when the street or part thereof sought to be used shall be more than one mile in extent, no petition of land owners shall be valid unless the same shall be signed by the owners of the land representing more than one-half of the frontage of each mile and of the fraction of a mile, if any in excess of the whole miles measuring from the initial point named in such petition, of such street or of the part thereof sought to be used for railroad purposes.

Ninety-sixth. To direct, license and control all wagons and other vehicles conveying loads within the city, or any particular class of such wagons, and other vehicles, and prescribe the width and tire of the same, the license fee when collected to be kept as a separate fund and used only for paying the cost and expense of street or alley, improvement or repair.

“Ninety-eighth. To pass all ordinances, rules and make all regulations proper or necessary, to carry into effect the powers granted to cities or village, with such fines or penalties as the city council or board of trustees shall deem proper: Provided, no fine or penalty shall exceed \$200, and no imprisonment shall exceed six months for one offense.”

In addition to these powers, the special charter which was granted to the City of Chicago prior to the passage of the Cities and Villages Act, contains the following provisions, which are applicable to the subject-matter of our discussion:

SECTION 10.

Ninth. To license, regulate and suppress hackmen, draymen, carters, porters, omnibus drivers, cabmen, carmen, and all others, whether in the permanent employment of any individual, firm or corporation, or otherwise, who may pursue like occupations, with or without vehicles, and prescribe their compensation.

Thirtieth. To control and regulate the streets and alleys, and to remove and abate any obstructions and encroachments therein.

Sixty-fourth. To make, publish, ordain, amend and repeal all such ordinances, by-laws and police regulations, not contrary to the constitution of this state, for the good government and order of the city, and the trade and commerce thereof, as may be necessary or expedient, to carry into effect the powers vested in the common council, or any officer of said city, by this act; and en-

force observance of all rules, ordinances, by-laws, and police and other regulations, made in pursuance of this act, by penalties not exceeding one hundred dollars for any offense against the same. The common council may also enforce such rules, ordinances, by-laws and police and other regulations, as aforesaid, by punishment of fine or imprisonment in the county jail, bridewell, or house of correction, or both, in the discretion of the magistrate or court before which conviction may be had: Provided such fine shall not exceed five hundred dollars, nor the imprisonment six months."

"SECTION 15.

Twenty-sixth. To make, publish, ordain, amend and repeal all such ordinance, by-laws and police regulations, not contrary to the constitution of this state, for the good government and order of the city and the trade and commerce thereof, as may be necessary or expedient to carry into effect the powers vested in the common council, or of any officer of said city, by this act, and enforce observance of all rules, ordinances, by-laws, police, sanitary and other regulations made in pursuance of this act, or the act to which this is an amendment, the amendments thereto, or any other act concerning said city, by punishment, fine or imprisonment in the bridewell or house of correction, or both, in the discretion of the magistrate or court before which conviction may be had: Provided, however, such fine shall not exceed five hundred dollars, nor the imprisonment two years."

According to the statute, and, as is held in *Chicago Dock Company v. Garrity*, 115 Ill. 155, the City of Chicago did not, by adopting the Cities and Villages Act, abrogate any of the powers conferred upon it by a special charter, unless those powers were in some way in conflict with the terms of the Cities and Villages Act.

Your committee has, therefore, before you not only the provisions of the Cities and Villages Act, but the provisions of the special charter to which we have just invited your attention, and, as is held in *Gundling v. City*, 176 Ill. 340-346, the city may predicate its right to pass the ordinance in question upon any single provision of either the Cities and Villages Act or the special charter, or upon any combination

of two or more of such provisions, or upon all of them combined.

In discussing Clause 42 of the Cities and Villages Act, to which we have heretofore referred, the court in *Allerton v. City of Chicago*, 6 Fed. 555, at page 557, says:

“By the general law of 1872, for the incorporation of cities and villages in this state, it is provided that the city council in cities shall have authority to license hackmen, draymen, omnibus drivers, cabmen, expressmen, and all others pursuing like occupations, and to prescribe their compensation. This was obviously intended as conferring a police power upon the city council in relation to the various classes named in the statute. This is a power that has been uniformly exercised, and, construing the statute literally, cannot well be questioned. But it is claimed it does not include the street railway, because it is not pursuing an occupation like any of those named.

Omnibuses may be licensed. They may pass over even the same streets as those occupied by the horse railways, and they may carry passengers in the same manner. The only distinction which can be called substantial between the two classes of occupation is that one carriage goes upon iron rails, in a regular track, with wheels, and the other carriage goes with wheels upon the ordinary street way.”

And in discussing the same subject, the court in *Farwell v. City*, 71 Ill. 269, at page 272, says:

“The spirit of the ordinance is, to bring the class of carriers therein named under the police regulations of the city. It is designed to operate upon those who hold themselves out as common carriers in the city for hire, and to so regulate them as to prevent extortion, imposition and wrong to strangers and others compelled to employ them, in having their property or persons carried from one part of the city to another. This is a rightful exercise of the police power. Cooley Const. Lim., 201. And it is a power that has, so far as our researches have extended, not been questioned. Were it not exercised, strangers visiting or passing through the city would be at the mercy of unscrupulous and irresponsible persons plying such business.”

In *Joyce v. City of East St. Louis*, 77 Ill. 156, the court, at page 158, says:

"In respect to such vehicles as those used for hire by hackmen and draymen, and the like, it is customary with municipal authorities to regulate and fix the rates of carriage. It is an ordinary police regulation, to protect the public against extortion and imposition on the part of those engaged in the business of common carriers for hire. One using a vehicle not for hire, but only in the course of his ordinary private business, does not come within the reason or necessity of any such municipal regulation. The provision of the charter as to prescribing the rates of carriage can reasonably apply only to such vehicles as are used for hire.

Under the rule of strict construction which must be applied in such a case, we are of opinion that the authority here to license is qualified by the clause for prescribing the rates of carriage, and that the true construction of the charter provision is that it does not authorize the licensing of all vehicles conveying loads in the city, but such, only, of them in respect to which it is proper and customary with municipal authorities to prescribe the rates of carriage, viz., those used for hire by common carriers in the city for hire."

And in *City of East St. Louis v. Bux*, 143 Ill. App. 276, the court, at page 278, says:

"This ordinance was enacted by virtue of the following power granted to city councils in this state: 'To license, tax or regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen and all others pursuing like occupation, and to prescribe their compensation.' It is quite evident the power granted is limited to the licensing, taxing and regulating the business or vocation of common carriers within a city, and the penalty referred to in Sec. 668 is intended to be imposed upon those only who engage in or carry on the business of common carriers within the City of East St. Louis, without a license."

In discussing a somewhat similar question, the Supreme Court of Pennsylvania in *Frankford, etc., Railway Company v. City of Philadelphia*, 58 Pa. St. 119, at page 124, says:

"The case stated hardly raises the question whether this is a reasonable regulation. The argument rather denies that it is a regulation at all. It is obvious, however, that its effect is that of a police regulation. It clearly furnishes a means of identifying every car which may be run in violation of those rights and public interests

which the city is authorized by its charter to maintain and secure. The city is authorized to 'ordain, constitute and establish such ordinances, regulations and constitutions, as shall be necessary for the government and welfare of the said city.'

But it is insisted there can be no regulation by license without express legislative authority. The mode or form of regulation, however, must be immaterial. It is the substance or effect only which need to be considered. Whether it is true that a police regulation cannot be made, by a requisition of licenses, without express authority from the legislature, may perhaps be a question in other cases. It is not in this. The 12th section of the Act of Assembly of April 15, 1850, Pamph. L. 469, enacted, 'that the Select and Common Councils of the City of Philadelphia shall have authority by ordinance or ordinances, to provide for the proper regulation of omnibuses, or vehicles in the nature thereof; and to this end, it shall be lawful for the said councils, etc., to provide for the issuing of licenses to such and so many persons as may apply to keep and use omnibuses or vehicles in the nature thereof, and to charge a reasonable annual or other sum therefor. This act is still in force. It plainly authorizes regulation by the issue of licenses. And we are of opinion that it applies to passenger railway cars. They are omnibuses, or if not, they are vehicles in the nature of omnibuses. They are opened to all, intended for all. The change of form from that of anything known when the Act of Assembly was passed, is not a change of the nature of the vehicle. In one city, at least, of Europe, large vehicles intended for indiscriminate public use, run sometimes upon a railway track, and at other times upon a common pavement. Nobody can doubt they are omnibuses. The form of the wheels or the character of the roadway over which a vehicle runs, does not determine its nature so much as do the uses to which it is put, and for which it was designed. We hold then that the ordinance of January 2, 1867, is valid as a police regulation, there being nothing to show that it is unreasonable. It follows that the plaintiffs were not entitled to a judgment on the case stated.'

In *Union Traction Company v. City*, 199 Ill. 484, the court at page 519, says:

"The occupation of hackmen, omnibus drivers and cabmen is the carrying of passengers for hire * * * The occupation of the appellant is the carrying of pas-

sengers for hire, and, therefore, its occupation is like the occupation of hackmen, omnibus drivers and cabmen." And continuing, the court, at page 523, says:

"The general doctrine is that the legislature has power to regulate the charges of common carriers. * *

Therefore, when the legislature gave to the City of Chicago under its charters above referred to, the power to regulate, and prescribe the compensation of, street railway companies as carriers of passengers, it gave the city power to pass Sections 1723 and 1725 set forth in the statement preceding this opinion."

Speaking further on the subject in question, the court in *Union Traction Company v. City*, 199 Ill. 484, at page 522, says:

"It necessarily follows that those whose business it is to propel street railway cars along the iron tracks laid in the public streets of a city, are engaged in the business of carrying passengers for hire, and that their occupation is of a like nature with the occupation of hackmen, omnibus drivers and cabmen, whose business also is the carriage of passengers for hire. The general doctrine is that the legislature has power to regulate the charges of common carriers. (*Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., Railroad Co. v. Iowa*, *id.* 155; *Ruggles v. People*, 91 Ill. 256; *Ruggles v. Illinois*, 108 U. S. 526.) The legislature, having such power, can confer it upon the common council of the city. In other words, the municipality may exercise the power by delegation from the state. (*Rogers Park Water Co. v. Fergus*, 178 Ill. 571; *City of Danville v. Danville Water Co.*, 180 *id.* 235; *Dean v. Chicago General Railway Co.*, 64 Ill. App. 155; *Chicago Packing Co. v. City of Chicago*, 88 Ill. 225.)

Therefore, when the legislature gave to the City of Chicago, under its charters above referred to, the power to regulate, and prescribe the compensation of, street railway companies as carriers of passengers, it gave the city power to pass Sections 1723 and 1725 set forth in the statement preceding this opinion. The grant of the power to regulate the occupation, and prescribe the compensation of those pursuing it, is accompanied by a grant of power to pass all such ordinances, rules and regulations as may be proper or necessary to carry into effect the power so granted."

In *Johnson Express Co. v. City of Chicago*, 136 Ill. App. 368, the court said at page 377:

“Express power is conferred upon the appellee ‘to license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen and all others pursuing like occupations, and to prescribe their compensation.’ Chapter 24, Article 5, Section 1, Sub-division 42. The ordinance before us finds warrant in the above clause which is a part of the charter of appellee. The spirit of the ordinance is to bring the class of carriers therein named under the police regulations of the appellee. The ordinance is designed to operate upon those who hold themselves out as common carriers in the city for hire, and is a rightful exercise of the police power. *Farwell et al. v. City of Chicago*, 71 Ill. 269. ‘All presumptions are in favor of its reasonableness, and such presumptions must prevail, nothing to the contrary appearing on the face of the ordinance or from proofs.’ *Standard Oil Co. v. City of Danville*, 199 Ill. 50, 54. ‘It is therefore incumbent upon any one who seeks to have been set aside as unreasonable to point out or show affirmatively wherein such unreasonableness consists.’ *People ex rel. v. Cregier*, 138 Ill. 401, 414.”

In *Hastings Express Co. v. City of Chicago*, 135 Ill. App. 268, the court said at page 270:

“The ordinance in question was passed by virtue of the power conferred upon the common council by Sec. 1, Art. 5, Chap. 24, R. S., viz.:

‘The city council in cities * * * shall have the following powers: * * * Forty-second: To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen and all others pursuing like occupations, and to prescribe their compensation.’

In *Farwell v. City of Chicago*, 71 Ill. 269, an ordinance similar to the one now before us was upheld as a proper exercise of the police power delegated to the municipality by the law-making power of the state, although the ordinance was declared to be inapplicable to the Farwells because they were not common carriers. This case, however, regardless of others, is a sufficient expression of opinion of the highest tribunal of this state by which the validity of ordinances of the character of the one under which appellant was convicted may be sustained.

It now but remains for us to dispose of the principal and controlling contention as to whether or not appellant is a common carrier, for if it is not a common

carrier then the ordinance here is as inapplicable to appellant as was the ordinance in the *Farwell* case, *supra*." And on page 272:

"The foregoing recitation would seem to us to contain facts in relation to appellant's business that in themselves fill all the legal requirements stamping it as a common carrier within the territory stated, both within and without the limits of the City of Chicago. The fact that it does not solicit business or have stands for its wagons upon the streets of the municipality, but makes special contracts for the carriage of all the goods it hauls, and does not carry for all who apply, or at the ordinance tariff, in no way detracts from its being in law a common carrier, for that it has all the attributes of a common carrier by team and wagon is manifest from the quotations above indulged from the agreed statement of facts appearing in the record.

Appellant amply fulfills the definition of a common carrier as 'one who undertakes for hire or reward to transport from place to place the goods of those who choose to employ him.' Vol. 6, Am. & Eng. Enc. Law, 237. Also another definition on p. 261, *ibid.*, as 'Ordinary carriers and expressmen engaged in carrying freight to and from a depot or warehouse or between places in the same locality or between different localities are common carriers and are liable as such.'

Appellant does not relieve itself from being a common carrier because of its performance of the business of a common carrier in a restricted way. This contention was held to be unavailing in *Wiggins Ferry Co. v. E. St. Louis St. Ry. Co.*, 107 Ill. 450, where the court say: 'Nor do we see anything in the objection that the business of the company is to be limited to the carrying of freight offered in cars only. Every common carrier has the right to determine what particular line of business he will follow. If he elects to carry freight only, he will be under no obligation to carry passengers, and *vice versa*. So if he holds himself out as a carrier of a particular kind of freight, or of freight generally, prepared for carriage in a particular way, he will be bound to carry to the extent and in the manner proposed. He will, nevertheless, be a common carrier.' "

And continuing on page 274:

"We are of opinion that appellant is a common carrier, and that the ordinance in question is valid, and that appellant is guilty of its violation in not procuring a license in conformity with its provisions."

In *City of Cairo v. Adams Express Co.*, 54 Ill. App. 87, the court said at page 89:

“Appellant claims the power to enact and reinforce said sixth section of the ordinance is conferred upon it by Par. 42, Art. 5, Sec. 1, Chap. 24, Rev. Stat., which reads as follows:

‘To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen and all others pursuing like occupations, and to prescribe their compensation.’ In *City of East St. Louis v. Bux*, 43 Ill. App. 276, a case decided by this court, in which Bux was acquitted in the court below of the charge of violating the provisions of a city ordinance depending for its validity upon the power granted by the above quoted statutory provision, we affirmed the judgment and held that power was limited to the licensing, taxing and regulating the business of common carriers carried on entirely within the city limits, and that those only who carry on that business within such limits, could by virtue of that provision be required to pay a license for the privilege and be subjected to a penalty for failing or refusing so to do, citing *Farwell v. Chicago*, 71 Ill. 269; *Joyce v. E. St. Louis*, 77 Ill. 156; *City of Collinsville v. Cole*, 78 Ill. 114.

Adhering to the views above expressed, we are of opinion appellee is not included in the class and vocation of expressmen, within the meaning and intent of that word as used in the statute, nor to that class whose compensation the city was empowered to fix and limit. Its business was not carrying express matter from one place to another within the city for hire, but to receive and deliver there such matter transported for hire to that place from outside points, and from the city to places beyond its limits.”

It will be seen from the foregoing authorities that it has been definitely and repeatedly held that the City of Chicago has power to regulate the rates that shall be charged by all common carriers plying such vocation within the City of Chicago, and that irrespective of the question as to whether the common carrier is engaged in the business of carrying passengers exclusively, carrying merchandise exclusively or engaged in the business of carrying both passengers or freight.

It is also apparent from these authorities that the object

of the regulation, such as we are discussing, is to prevent fraud and extortion.

We are therefore of the opinion that the City Council has the right to regulate the rates of fare to be charged for the transportation of passengers on steam railroads from one point to another within the City of Chicago.

We believe our answer to your first question obviates the necessity for answering your second and third questions, but for your information we are giving you the answer sought by your second and third questions.

If the city were without authority to regulate the fares in question, that authority would be vested in the State Railroad & Warehouse Commission, which has been created by the legislature, or in the legislature itself.

Answering your third and last question, we beg to advise you that if the city were without authority to regulate the rates of fare in question it would be necessary to obtain the passage of an act by the legislature conferring such authority before the city could regulate such fares.

Yours respectfully,

CHAS. M. HAFT,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 15, 1913.

DR. G. B. YOUNG, Commissioner of Health.

Dear Sir:

The question of whether St. Joseph's Hospital will be required to secure frontage consents for an addition to the present hospital building on property purchased subsequent to the time of purchase of the tract on which the original hospital building stands, was referred to the undersigned for consideration and reply.

It seems from the plat submitted and from the statement of the attorney for the hospital, that a large plot of ground was originally purchased which was only partially improved, and that more recently, additional property was purchased

connecting with the original tract, which is also unimproved. It is now proposed to improve a part of the original tract and a part of the new property purchased later with an addition to the present hospital.

A portion of the ordinance in question reads as follows:

“It shall be unlawful for any person, firm or corporation to build, construct, maintain, conduct or manage in any block, in which two-thirds of the buildings fronting on both sides of the street or streets on which the proposed hospital may front are devoted exclusively to residence purposes, any hospital, unless the owners of a majority of the frontage in such block, and the owners of a majority of the frontage on the opposite side or sides of the street or streets on which said building faces, consent in writing to the building, constructing or maintaining, managing or conducting of any such hospital in such block.”

The question of frontage consents for extensions has frequently arisen where the hospital structure itself occupied only a portion of the lot or tract of ground used for hospital purposes. In all these cases we have held that the original frontage consents authorizing the construction of a hospital on the tract of ground in question were sufficient to cover any additions thereto erected on the ground for which frontage consents were secured, but we have in these cases been careful to distinguish between such extensions and the question which we felt sure would sooner or later arise, as to whether such consents would be necessary where the proposed addition went onto new ground not used for hospital purposes.

The ordinance itself is somewhat vague as to this point, and we can find no authority in the decided cases which is at all helpful. A reasonable construction of the ordinance would lead us to the conclusion that such frontage consents are necessary in the present instance.

Assuming that a person secured frontage consents for the establishment of a hospital on a small lot in a block, and that owners of property gave their consent under the belief that the hospital was to occupy only that lot, it would clearly be contrary to the spirit of the ordinance for the person who erected such a hospital to make extensions which converted

same from a small to a large institution, possibly covering the entire block.

While the above is an extreme illustration, still there is no way of drawing the line where it would be proper to check the growth of an institution if the rigid rule is not adhered to, that no extension beyond the original lot is permissible.

Although the hospital under consideration was established long before the city had any control over the location of same, and therefore was not required to secure frontage consents originally, nevertheless the same principle applies as would apply in case it was only recently established and had secured frontage consents under the present ordinance.

We therefore take the view that so far as the extension covers property which was not heretofore used for hospital purposes, whether the same was a part of the original purchase or was purchased later, frontage consents will have to be secured.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

JANUARY 16, 1913.

HON. JOHN ERICSON, Chairman, Harbor and Subway Commission, City Hall Square Building, Chicago, Illinois.

Dear Sir:

We are in receipt of your communication asking to be advised as to whether subways can be constructed under the surface of public streets in the City of Chicago by the municipality without consent of a majority of the property owners along the routes that may be selected, and whether in case of failure to obtain such consent, if required, there is any other legal method whereby the same results can be obtained.

The ninetieth clause of Section 1 of Article V of Chapter 24 of the R. S. of Illinois (Cities and Villages Act) is as follows:

“The city council or board of trustees shall have no power to grant the use of or the right to lay down any railroad tracks in any street of the city to any steam, dummy, electric, cable, horse or other railroad company, whether the same shall be incorporated under any general or special law of the state, now or hereafter in force, except upon the petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes, and when the street or part thereof sought to be used shall be more than one mile in extent, no petition of land owners shall be valid unless the same shall be signed by the owners of the land representing more than one-half of the frontage of each mile and of the fraction of a mile, if any in excess of the whole miles measuring from the initial point named in such petition, of such street or of the part thereof sought to be used for railroad purposes.”

The clause quoted limits the power of cities in *granting to another* the use of or the right to lay down railroad tracks in any street of the city. In such case a city has no power to make the grant except upon the petition of those owning more than one-half of the frontage of the streets to be used.

McGann v. The People, 194 Ill. 526.

If, however, the city itself constructs the subways, there is nothing in the clause above quoted or in the act of May 13, 1903, commonly called “The Mueller Law” or elsewhere, that requires the city to procure the consent of persons owning land fronting on the streets to be used.

If the city should construct subways in the streets for street railway purposes, and should then undertake to grant *to another* the use of or the right to lay down railroad tracks in the subways, a different question would be presented. We, however, understand your inquiry to be limited to whether subways can be constructed under the surface of public streets in Chicago *by the municipality* without the property owners’ consent.

Yours very truly,
BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

JANUARY 16, 1913.

HON. JOHN McWEENY, General Superintendent of Police,
Chicago.

Dear Sir:

We are in receipt of your communication of January 15, 1913, asking to be advised whether the restaurant license mentioned in the caption hereof can be revoked under the circumstances stated in the letter of Police Captain Michael Ryan to you, dated January 14th, which is attached to your communication.

Section 1318 of the Chicago Code of 1911, being a part of the chapter entitled "Restaurants," is as follows:

"1318. Any license so granted may be revoked by the mayor by notice in writing, whenever it shall appear to his satisfaction that the person so licensed shall have violated the provisions of any law of the State of Illinois, or of this or any other ordinance of the City of Chicago relative to the keeping of restaurants, or any condition of the bond aforesaid."

Section 1512 of the Code, being a part of the chapter on "Licenses," is in part as follows:

"The mayor shall also have power to revoke for cause any license granted by him."

It appears from Capt. Ryan's communication that since the restaurant license in question was issued, the licensee has been arrested on the charge of being the keeper of a disorderly house at the location, for which the license was granted or the premises adjoining thereto and connected therewith, and that he was convicted of said offense and fined \$5.00 and costs by Judge Hopkins, of the Municipal Court.

We are of the opinion that the conviction mentioned affords grounds for the revocation of the license in question.

We return herewith Capt. Ryan's communication of the 14th instant.

Yours very truly,
BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

JANUARY 16, 1913.

HON. JOHN McWEENY, General Superintendent of Police.

Dear Sir:

Your request for an opinion relative to regulation of labor agencies in Chicago has been referred to me for reply.

Express charter power is given the city council to pass ordinances taxing, licensing and regulating brokers, but not over persons carrying on the business of an employment agency unless they can be held to be brokers. The courts have often defined a "broker" as one who negotiates the sale or transfer of property as an agent for a principal and not one who operates on his own behalf.

In my opinion one conducting the business of an employment agency is not to be considered a broker. I have grave doubts as to whether or not the city council can legislate on this subject in the absence of express statutory authority.

An act relating to private employment agencies, in force July 1, 1909, Hurd's Revised Statutes, 1911, Chapter 48, page 1117, while entrusting the enforcement of the act to the State Board of Commissioners of Labor and an officer to be known as Chief Inspector of Private Employment Agencies and the inspectors under him, and while providing that they "may institute criminal proceedings for its enforcement before any court of competent jurisdiction," and that they "shall have full power to execute and serve all warrants and process of law issued by any justice of the peace or police magistrate or by any court having jurisdiction under the law relating to employment agencies in the same manner as any constable or police officer, may serve and execute such process, or may arrest on view and without warrant, any unlicensed person detected by them actually violating any of the provisions of this act and may take such person so offending before any court having jurisdiction of the offense, and make proper complaint before such court, which shall proceed with the case in the manner and form provided by law," does not, I think, give them exclusive power to prosecute or arrest on account of criminal offenses committed in violation of the act.

I am therefore of the opinion that the police officers

may make arrests for violation of the criminal provisions of this act.

Inasmuch as this act is comprehensive in its nature and its enforcement would obviate the evils complained of, no further legislation seems necessary.

Respectfully yours,
LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

JANUARY 16, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Replying to your inquiry to Mr. Sexton in regard to the right to publish the names and photographs of persons recently brought to Chicago under parole from the penal institutions at Chester, I beg to advise you.

There are two institutions at Chester, the Illinois Southern Penitentiary and the Illinois Asylum for Insane Criminals.

The inmates of both of these institutions are persons convicted of crime. Section 475 of the Criminal Code of Illinois imposes upon the wardens of the various penitentiaries the duty of measuring and photographing the persons committed to their charge.

Section 477 provides:

“The register herein provided for shall not be made public, except as may be necessary in the identification of persons accused of crime, and in their trial for offenses committed after having been imprisoned for a prior offense.”

Section 501 of the Criminal Code contains the Parole Act. The status of a paroled prisoner is stated to be:

“* * * All prisoners so temporarily released upon parole shall, at all times, until the receipt of their final discharge, be considered in the legal custody of the warden of the penitentiary from which they were paroled, and shall during the said time, be considered as remain-

*ing under conviction for the crime of which they were convicted and sentenced. * * **

The Parole Act also provides:

"It shall also be the duty of such sheriff to keep secret the fact that such prisoner is a paroled prisoner, and in no case divulge such fact to any person or persons so long as said prisoner obeys the terms and conditions of his parole."

Nowhere in the statutes of this state is there any prohibition against the publication of these photographs and other information in connection therewith, excepting as above.

If it should be charged that any publication be a libel, a complete answer will be found in the constitution of the State of Illinois.

"In all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense."

No person has such a "right of privacy" that he can forbid the publication of his picture in the newspapers.

Chief Justice Alton B. Parker in a decision in the New York Court of Appeals reported in 59 L. R. A. 478, reviews the question thoroughly. He denies that the "right of privacy" is recognized in the United States, or that any person can prohibit the publication of a portrait of himself.

A person convicted of crime, at least while serving his sentence, has surrendered to the public any such rights he may have had.

I am of the opinion that a paroled prisoner must be regarded the same as a prisoner still within the walls of the penitentiary and that his picture and record may be freely published unless it is maliciously done.

This is true whether the persons come from the penitentiary or the Asylum for Insane Criminals at Chester.

Very respectfully,

GEO. L. REKER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 17, 1913.

MR. ALBERT J. W. APPELL, Chief Assistant Prosecuting Attorney.

Dear Sir:

Your request for an opinion *in re* violation of Section 1327 of the Chicago Code by Level & Company in operating a slaughter house at 48th avenue and 39th street, Cicero, without a license, has been referred to me for reply.

Hurd's Revised Statutes, 1911, Chapter 24, Article V, Section 1, Clause 81, gives the city council power—

“To direct the location and regulate the management and construction of packing house renderies, tallow chandleries, bone factories, soap factories and tanneries within the limits of the city or village, and within the distance of one mile without the city or village limits.”

Section 1327 of the Chicago Code of 1911 was passed in pursuance of the authority granted by the clause above quoted.

The case of *Chicago Packing & Provision Company v. City of Chicago*, 88 Ill. 221, directly passes on the validity of an ordinance of a similar character as the one now in force. In this case an action was started by the City of Chicago before a police magistrate against the Chicago Packing Company located without the city limits but within one mile thereof, for failure to take out a license for engaging in the business of slaughtering, rendering, etc.

This case was tried in the Criminal Court on an appeal from the police magistrate on a stipulation as to the facts. The Chicago Packing Company had obtained a license from the Town of Lake and contended that the City of Chicago had no power to pass or enforce an ordinance requiring a license for such business. The Supreme Court, however, sustained the ordinance and affirmed the judgment against the Chicago Packing Company for failure to comply with the ordinance.

I am of the opinion that prosecution of Level & Com-

pany should be started before a justice of the peace in this county in order that we may get service on said company.

Very respectfully yours,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 17, 1913.

THE ANTI-SALOON LEAGUE OF ILLINOIS, 1200 Security Building, Chicago, Ill.

Gentlemen:

The Mayor has referred to this department your communication to him of the 13th instant in regard to the issuance of saloon licenses in the territory formerly known as the Burnside Prohibition District. This territory was a part of the former Village of Hyde Park before the annexation of that village to the City of Chicago.

The territory in question was made a prohibition district by ordinance of the Board of Trustees of the Village of Hyde Park, passed November 5, 1888. After the annexation of the Village of Hyde Park to the City of Chicago an election was held on April 1, 1902, pursuant to the provisions of Section 18 of the Annexation Act, at which election a majority of the voters in the territory over which the said ordinance extended, voting on the question, voted "For Dram Shops."

Section 18 of the Annexation Act provides that "if it shall appear that a majority of the voters so voting upon the question vote "For Dram Shops" then licenses may be issued for said territory on the same terms and conditions as licenses are granted by ordinance within other parts of the municipality."

Ever since the said election, resulting as aforesaid, saloon licenses have been issued for locations in the territory in question in accordance with the provisions of the general ordinances of the City of Chicago governing the liquor traffic.

Yours very truly,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 20, 1913.

HON. JAMES S. McINERNEY, Prosecuting Attorney.

Dear Sir:

Your letter of the 16th instant *in re* the application of ordinance requiring soap manufacturers to procure a license in the case of the T. J. Peterson Company, has been referred to me for reply.

The Chicago Code of 1911, Section 2363, provides as follows:

“No person or corporation shall carry on the business of manufacturing soap within the city or within one mile of the limits thereof, without first having obtained a license for such business as hereinafter provided for each soap factory conducted by such person or corporation.

The term ‘soap’ shall include seourene, soap powder, liquid soap or any chemical compound in domestic use for washing and cleansing made by the union of certain fatty acids with a salifiable base.”

The provision of the above section that the term “soap” shall include “any chemical compound in domestic use for washing and cleansing made by the union of certain fatty acids with a salifiable base” should not, I think, be construed to limit the application of this section to persons or corporations manufacturing soap to be used for domestic purposes.

“Shall include” is not a phrase of limitation, rather it is a phrase of enlargement and in ordinary signification implies that something more has been included than the general language which precedes it.

I am of the opinion, therefore, that inasmuch as the T. J. Peterson Company manufacture soap, it is required to obtain a license for such business.

Yours very truly,

LORING R. HOOVER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 20, 1913.

HON. RAY PALMER, City Electrician.

Dear Sir:

Your communication of the 14th instant *in re* charge for books containing the rules and regulations of your department and published by it, has been referred to me for reply.

The courts have repeatedly held that a municipality may sell or dispose of its surplus property not needed for public use. In the case of *Crouch v. City of McKinney*, 47 Tex. Civ. App. 54; 104 S. W. 518-9, the city operated an electric light plant for the supply of light for its buildings and streets, etc. The court says on page 519:

“When the city has a surplus of power after discharging its duty to the public, there seems to be no question of its authority to sell the excess to private citizens.”

Overall v. Madisonville (Ky.), 12 L. R. A. (N. S.) 433;

Henderson v. Young, 119 Ky. 224;

Rogers v. Wickliffe, 29 Ky. L. Repts. 587;

Pike's Peak Power Co. v. Colorado Springs, 105 Fed. 1.

It being necessary for your department to publish its rules and regulations in book form for its own use, such books as are not required may, I think, be disposed of by it upon proper council action. I have prepared an ordinance and submit same herewith, which I think will give you this authority.

Yours respectfully,

LORING R. HOOVER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 21, 1913.

HON. EDWARD COHEN, City Collector.

Dear Sir:

We have been requested by the Mayor to advise you in regard to the law governing the issuance of saloon licenses to corporations for locations in that part of the City of Chicago which was formerly the Village of Hyde Park.

Section 1529 of the Chicago Code of 1911, -as amended July 17, 1911, provides among other things that no saloon license shall be issued to or in the name of a corporation.

The Village of Hyde Park was annexed to the City of Chicago June 29, 1889. At the time of such annexation there was no ordinance in force in the Village of Hyde Park forbidding the issuance of a saloon license to a corporation. Under the provisions of the Annexation Act as construed by our Supreme Court, all liquor laws which were in force in a village at the time of its annexation to a city, continue in full force and effect notwithstanding such annexation.

The Supreme Court of Illinois held in the case of *People v. The Heidleberg Garden Co.*, 233 Ill. 290, that a dram shop license might be lawfully issued to a corporation where there was no ordinance providing otherwise.

Since the annexation of the Village of Hyde Park and up to the present time, saloon licenses have been issued to corporations for locations in the territory formerly constituting that village, doubtless upon the theory that the Chicago ordinance forbidding the issuance of saloon licenses to corporations did not apply to that territory.

On January 11, 1912, an information in the nature of a quo warranto was filed in the Superior Court of Cook County by the *People of the State of Illinois v. Fifty-Fifth Street Buffet Co.* (General Docket No. 291,826), in which the validity of a saloon license issued by the City of Chicago for a location in said former Village of Hyde Park was attacked on the ground that such license could not be lawfully granted to a corporation.

Judge Goodwin of said Superior Court after hearing elaborate arguments, held in effect that the Chicago ordinance against issuing a saloon license to a corporation applied to saloon locations in the Village of Hyde Park equally with other parts of the City of Chicago, and on September 16, 1912, entered a judgment finding that the license in question had been granted without warrant of law and adjudging that the respondent, Fifty-fifth Street Buffet Co., be ousted and prohibited from further holding or exercising the license. The defendant removed the case to the Appellate Court of Illi-

nois for the First District on writ of error, but dismissed said writ of error on January 2, 1913.

Since the annexation of the Village of Hyde Park, the City of Chicago has passed the so-called wine room ordinance and the ordinance raising the license fee from five hundred dollars per annum to one thousand dollars per annum, and other ordinances laying additional restrictions and burdens upon the liquor traffic, and all of such ordinances have been extended in their operation over the territory constituting the former Village of Hyde Park as well as all other portions of the City of Chicago.

We are of the opinion that the ordinance of the City of Chicago providing that no saloon license shall be issued to, or in the name of a corporation, applies to all territory within the corporate limits of the City of Chicago, and that a saloon license cannot lawfully be issued to a corporation to keep a saloon in that portion of the City of Chicago which was formerly the Village of Hyde Park.

Yours very truly,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 22, 1913.

HON. FRANCIS D. CONNERY, City Clerk, City of Chicago.

Dear Sir:

Under date of the 20th inst. you asked to be advised as to the particular form in which you should publish the appropriation ordinance for 1913 so as to conform with the provisions of the law governing such publication.

Section 3 of Article V of the Cities and Villages Act provides that all ordinances making any appropriation shall within one month after they are passed be published at least once in a newspaper published in the city and no such ordinance shall take effect until ten days after it is so published. (Hurd's R. S. 1911, p. 269.)

It is your duty, therefore, to publish the appropriation

ordinance for the year 1913 on or before February 1, 1913 at least once in a newspaper published in the City of Chicago.

Chapter XLIX of The Chicago Code of 1911 provides for the letting of a contract annually for the publication in an English newspaper, being published at least six times a week, of those matters required by law or any ordinance of the city to be published in a newspaper and the newspaper to which such contract may be awarded shall be the official journal of the city.

You should, therefore, publish in the newspaper to which the contract has been let and which is now the official newspaper of the City of Chicago for the purpose of making legal publications.

January 2, 1913 the City Council passed an ordinance entitled "An ordinance making appropriation for Corporate, School, Public Library and Tuberculosis Sanitarium purposes for the fiscal year from January 1, 1913 to December 31, 1913," which ordinance is published at pages 3048 to 3175 inclusive of the Journal of the Proceedings of the City Council of said date.

January 8, 1913 the Mayor vetoed certain items of said appropriation ordinance passed January 2, 1913 which veto, together with the changes made by the Mayor, appear at pages 3181 to 3193 inclusive of said Journal of the Proceedings of January 8, 1913.

January 20, 1913 the City Council passed an ordinance amending said ordinance of January 2, 1913, which ordinance has not been published in the Journal of the Proceedings but which I understand was approved by the Mayor on January 20, 1913.

In my opinion, to constitute a legal publication, you should publish in the official newspaper in Chicago, within the time above set out, the following:

First, said ordinance passed by the City Council January 2, 1913 and printed at pages 3048 to 3175 inclusive of the Journal of the Proceedings of the City Council of January 2, 1913;

Second, the Mayor's veto message of January 8, 1913 printed at pages 3181 to 3193 inclusive of said Journal of

January 8, 1913, together with the record of the action of the City Council thereon as set out at page 3193 of said Journal of January 8, 1913;

Third, said ordinance passed January 20, 1913 amending said ordinance of January 2, 1913.

In my opinion said ordinance passed January 2, 1913, said veto of the Mayor of certain items thereof, said action of the City Council upon receiving said veto message and said amendatory ordinance of January 20, 1913 constitute the annual appropriation ordinance for the year 1913.

I respectfully suggest that the following would be a proper certificate by you in making such publication:

COUNTY OF COOK. }
"STATE OF ILLINOIS, } ss.

I, Francis D. Connery, City Clerk of the City of Chicago, do hereby certify that the foregoing is a true and correct copy of the certain ordinance passed by the City Council of said City of Chicago on the Second (2) day of January, A. D. 1913 'making appropriation for Corporate, School, Public Library and Tuberculosis Sanitarium purposes for the fiscal year from January 1, 1913 to December 31, 1913;' and

I do further certify that the following is a true and correct copy of the certain veto message submitted by Honorable Carter H. Harrison, Mayor of the said City of Chicago, to said City Council of said City at its regular meeting held on the eighth (8) day of January, A. D. 1913 vetoing certain items of said Appropriation Ordinance passed January 2, 1913; viz.:

(Veto Message.)

And I do further certify that the following is a true and correct copy of that portion of the Journal of the Proceedings of said City Council showing the action taken by said City Council on said eighth (8) day of January, A. D. 1913 with reference to said veto message; viz.:

(Insert copy of Journal showing action of Council on veto message.)

FRANCIS D. CONNERY,
City Clerk."

(Seal.)

(Insert Amendatory Ordinance of January 20, 1913.)

"STATE OF ILLINOIS, }
COUNTY OF COOK. } SS.

I, Francis D. Connery, City Clerk of the City of Chicago, do hereby certify that the foregoing is a true and correct copy of the certain ordinance passed by the City Council of said City of Chicago on the twentieth (20) day of January, A. D. 1913 entitled 'An ordinance amending an ordinance entitled "An ordinance making appropriation for Corporate, School, Public Library and Tuberculosis Sanitarium purposes for the fiscal year from January 1, 1913 to December 31, 1913" passed by the City Council January 2, 1913 and vetoed as to certain items thereof and amended January 8, 1913' which said ordinance passed January twentieth (20), 1913 was approved by the Mayor of said City on January twentieth (20), 1913.

(Seal.) FRANCIS D. CONNERY,
City Clerk.

I have the honor to be

Yours truly,

WM. H. SEXTON,
Corporation Counsel.

JANUARY 22, 1913.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

On behalf of your committee you have asked the Corporation Counsel to answer three questions which we have taken up below in the order in which you inquired about them. Your first question reads as follows:

"Can the city under its police power compel an extension of the present contract, having no other means of disposal of garbage?"

Your question contemplates the possibility of forcing someone to do work for the city contrary to his inclination. This is utterly beyond the power of the city. It is in fact forcing a condition of involuntary servitude which is contrary to the constitution of the United States and also the constitution of the State of Illinois. Even though the needs of the city might be great in this respect because it would have no other means of disposing of garbage, it could proceed in no

other way than by making another contract entirely voluntary on the part of the contractor if it desired to extend the time within which the present contract shall run.

Your second question is as follows:

“Can the city let the contract to the lowest bidder under the present proposals and advertise for letting of the contract for construction of buildings by an outside contractor, providing for deferred payments to be made by the city?”

There seems to be no reason why the city can not make a contract for the construction of the building necessary for garbage disposal with a contractor who is not concerned with the disposition of garbage. The act authorizing the city to make contracts of this kind uses the plural. The city is “authorized and empowered to make contracts for more than one year and not exceeding five years, relating to the collection and final disposition of garbage and ashes.” Under this power it certainly has authority to make more than one contract, otherwise the clause would read “a contract” instead of “contracts.” The contract for the construction of the building is as much a contract in relation to collection and final disposition of garbage as is the contract for reducing same. Since the contract for the building stands on precisely the same footing as the contract for the reduction of the garbage, it is possible to defer payments in the same manner as in the main contract which you have under consideration.

Your third question reads as follows:

“Can the city let a contract for disposition of garbage which provides also that the contractor shall build a plant, the city to have the option to buy at a stipulated price or at a price to be ascertained when the city elects to purchase in case there is no prior appropriation in the annual appropriation ordinance for such financial obligation?”

We read the act in question to mean that all contracts in relation to the collection and final disposition of garbage may be made before any appropriation for same is passed by the City Council. A reasonable interpretation of Section 2 of this act, which makes it the duty of the City Council to include in the annual appropriation ordinance of each current

fiscal year, an appropriation of a sufficient sum of money to pay the amount which will become due during the current fiscal year whenever the city makes a contract in accordance with the provisions of this statute, would seem to be that such a contract may be entered into without a prior appropriation being made, but that after the contract is made the city is bound each year to make appropriation for the expense. In this respect it is a complete departure from the ordinary method of procedure requiring an appropriation before a contract can be let. It is clear from the wording that this was the intention, otherwise there would be no occasion for the special act.

While there is no authority to which we can point to support our views on the above three questions, we believe the language of the statute is sufficiently plain and that there can be no mistake as to same.

Yours respectfully,
(Signed.) LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

(Signed.) WM. H. SEXTON,
Corporation Counsel.

JANUARY 22, 1913.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

Concerning your question as to whether a fine imposed upon a street railway company is properly deductible out of the gross receipts before the city's fifty-five per cent. is paid, or whether it must come out of the company's forty-five per cent., we beg to advise you that our answer to your question must be predicated upon Section 25 of the Chicago Railways Company ordinance, and Section 24 of the Chicago City Railway ordinance. Those two provisions so far as the subject under discussion is concerned, are substantially identical, and are to the effect that out of the gross receipts received by the companies, and property from all sources of every kind, there shall be deducted:

First: All expenses of operation, including maintenance, repairs and renewals;

Second: All amounts contributed during said year and then held in reserve under the provisions of Sections 16 and 18 of said ordinance;

Third: All amounts paid out for taxes and assessments levied or imposed upon the real and personal property of the company, including all capital stock or franchise taxes levied or assessed after the year 1906, but not including any taxes which may by any court be ordered to be levied, assessed or collected after the year 1906 on account of the failure of the company or any person, firm or corporation owning or having an interest in the said street railways or property, to pay any taxes which should have been paid for or on account of such street railways or property prior to the year 1907, and not including any sums paid by the company to the city for license fees, if any, exacted from the company or its employes;

Fourth: All salaries and expenses of the Board of Supervising Engineers by this ordinance authorized, after the period of "Immediate Rehabilitation"; and,

Fifth: A sum equivalent to five percentum per annum for said preceding year upon the amount of the cash purchase price which the said city would then be obligated to pay on account of the items specified in subdivisions 1, 2 and 3 of Section 20 of said ordinances, if it were purchasing the property for municipal operation on the 31st day of January, interest being adjusted as to items added to such purchase price during such year. In case in any year the gross receipts shall not be sufficient to pay the items on the first and second paragraphs of said sections, then the deficit to be paid on the gross receipts of the subsequent year or years.

The foregoing covers substantially all the enumerated items. Then the ordinances provide:

"After the deduction from the gross receipts of the items hereinbefore in this Section provided, the amount remaining shall be considered as the net receipts for such year arising from the operation of the street railway system hereby authorized, and shall be divided between the Company and the said City in the following proportions: forty-five (45) per cent. to be retained by the

Company and fifty-five (55) per cent. to be paid forthwith by the Company to the said City, crediting thereon all amounts paid out during the preceding year by the Company for City license fees, if any, exacted from the Company or its employes."

The question for us to determine then is, if the items of fines paid for the violation of city ordinances is comprehended by the terms of items to be deducted before the division of net receipts is made between the company and the city. Clearly, fines are not in terms included in the items to be deducted. The only remaining question then is, are fines included within the terms aforesaid by implication? We are inclined to the opinion that they are not so included. It would hardly seem fair to require the city to bear fifty-five per cent. of the burden occasioned by the misconduct of the railway companies in failing to comply with police regulations.

We therefore advise you, that fines paid by street railways companies for violation of city ordinances, are not to be deducted before the city receives fifty-five per cent. of the "net receipts," but that such fines are to be deducted from the railway companies' forty-five per cent. of said net receipts.

Respectfully submitted,

CHARLES M. HAFT,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 23, 1913.

HON. GEORGE A. SCHILLING, President, Board of Local Improvements, City Hall, Chicago.

Dear Sir:

Your favor of the 13th ultimo, addressed to Hon. William H. Sexton, Corporation Counsel, requesting an opinion on certain legal questions involved in the widening of Michigan Avenue, has been referred to this department for answer.

As stated in your communication, the improvement contemplated, comprises substantially the widening of Michigan

Avenue from Randolph Street to the Chicago River and Pine Street from the Chicago River to Chicago Avenue, the construction of a bridge across the Chicago River to make the street a connected thoroughfare, the improvement of the street by an elevated structure intended to provide more convenient accommodation for the different kinds of traffic, principally by separating the pleasure and lighter vehicles from the heavier traffic, and also for the paving of the entire thoroughfare included in the improvement.

You also state that Pine Street from Ohio Street to Chicago Avenue is now under the jurisdiction of the Lincoln Park Commissioners, but that it may be assumed that before the proposed proceedings are begun, jurisdiction over that portion of Pine Street will be surrendered to the City of Chicago by the Lincoln Park Commissioners.

The questions on which you desire an opinion have been specifically set out in your communication, and we shall consider them in the order in which they appear. The first and second questions are so intimately related that they may be appropriately discussed together.

“First: Can the City of Chicago lawfully provide for the widening of the thoroughfare in question and the complete improvement thereof, including the bridge and the proposed structural improvement, in one special assessment proceeding?”

“Second: If not, how much of the improvement could be combined with the widening of the thoroughfare? Can the construction of the bridge be combined with the widening in the same special assessment proceeding? If not, and if separate provision was made for the bridge, could the remainder of the structural improvement be combined with the widening in one special assessment proceeding? In other words, what procedure could legally be adopted with reference to the three component parts of the improvement; the widening, the bridge, the remainder of the structural improvement?”

Before discussing the precise inquiry whether the complete scheme could be provided for in one ordinance and conducted in one special assessment proceeding, it would be

proper to determine the preliminary question whether such an improvement would be a local improvement; and this, in turn, would largely depend upon the question whether the several improvements which would constitute, as it were, elements of the single scheme, are in themselves, separately considered, local improvements.

It is apparent that if any substantial component part of the entire scheme were not a local improvement and could not be constructed by special assessment, the complete improvement would not constitute a local improvement that could be paid for by special assessment.

The question whether an improvement is a local or general improvement is largely one of fact. (*Bush v. City of Peoria*, 215 Ill. 515.)

A local improvement has been described as a public improvement which, by reason of its being confined to a particular locality, enhances the value of adjacent or contiguous property by conferring a special benefit upon it different from the benefit which may be received generally by the public. (*Loeffler v. City of Chicago*, 246 Ill. 43.)

Applying these principles to each of the proposed improvements which is embraced in the general plan, it will be seen that the test in determining whether the improvement is local or general is to ascertain whether or not there will be a certain territory, either contiguous or adjacent to the improvement, which will receive a special benefit different from the general benefit that the public at large will receive. The solution of this question must be made by real estate experts.

If we are permitted to express an opinion on this question of fact, however, we would say generally that a certain, but not necessarily common territory can be defined which will receive special benefits different from the other property in the city, whether the improvements are united in one ordinance and conducted in one proceeding, or whether they are provided for in different ordinances and conducted in separate proceedings. In other words, we are of the opinion that the complete improvement, and each of the several parts which it is desired to include in the one proceeding, are all local improvements; or, to put it another way, we do not think

that the question whether the improvement is local depends upon the question whether the entire scheme can be conducted in one proceeding or whether the several parts of it would have to be provided for in separate ordinances and conducted in distinct proceedings. It is our opinion that if either the bridge, the elevated structure, the widening, or the paving, were to be provided for in a single ordinance and conducted in a single proceeding, each would be a local improvement which could be paid for by special assessment.

It is unnecessary to cite authorities on this point, as we are confident it will be generally conceded that our position is correct. There can be no doubt as to the soundness of our conclusions as to the widening of the street, the elevated structure, and the paving, all being local improvements. The only doubt that could arise would be in respect to the bridge. This, however, is a question of fact, and if it can be shown, as we are confident it can be, that a particular territory would be specially benefited by the construction of the bridge, it would follow in the general rule that such an improvement would be a local one. In this connection we shall refer to one authority which we think will support our position and that is the case of *L. & N. R. R. Co. v. City of E. St. Louis*, 124 Ill. 656-662, where it was held that the construction of a viaduct over several railroad tracks and a creek in E. St. Louis constituted a local improvement.

Holding then as we do that each of the separate elements of the single scheme, if it should be so considered, constitutes in itself a local improvement, it would necessarily follow that if the three could be united in one, such an improvement also would be a local improvement and would be free at least from any objection that it was a general improvement.

This brings us to the precise inquiry stated by you, namely, whether the complete scheme of improvement, including the widening, the bridge, the elevated structure and the paving can be provided for in one ordinance and conducted in one proceeding. We are free to confess that this proposition presents a question which is difficult to determine.

It will be observed, in the first place, that it involves the inclusion of condemnation with special assessment. Even if

the condemnation feature for the widening of the street were eliminated, the question whether the bridge and the elevated structure could be combined in one proceeding would not be easy of solution. But when it is proposed to condemn land for the widening of the street, and in the same proceeding to include the construction of the bridge and the elevated structure, the question becomes more perplexing. The paving of the street does not complicate the proceeding and need not be discussed separately, as when it is considered in connection with the entire scheme, it becomes in our opinion a minor and incidental part of the larger improvement. The condemnation proceeding could be brought only for the purpose of acquiring land for a single public improvement, not for two or more public improvements which might be separate and distinct; and the amount of land taken should be limited to the needs of the improvement. In this regard, however, the judgment of the municipality would not be reviewable by the courts except for a clear abuse of power. (*C. & W. I. R. R. Co. v. City of Chicago*, 255 Ill. 136.) Furthermore, the use of the land which is to be acquired must be directly related to the improvement for which the land is condemned. To illustrate, where land is condemned for the construction of a sewer, it is clear that such land must be actually used for the construction, operation and maintenance of the sewer; in other words, the land is an essential and necessary element which must be acquired in order that the sewer could be constructed, and without which the sewer could not be constructed. Can it be said in the present case, if the plan of the proposed improvement is to be treated as a single one and provided for in one ordinance, that the acquisition of the land proposed to be taken by condemnation is directly and essentially connected with the whole improvement?

There are two ways in which this question can be approached. First, it may be said that there is one single scheme of improvement which the municipality desires to accomplish, and which may be generally stated as the improvement of Michigan Avenue. It may be objected that the determination of this improvement cannot be comprised in a single name, but nevertheless it may be contended with con-

siderable force that the widening of the street, the construction of the bridge, the elevated structure, are all mutually dependent upon each other, all benefit the same territory, are all directly connected, and all tend to the accomplishment of a single purpose, which is to secure a more adequate, commodious and attractive thoroughfare. If this position can be supported by the facts, then the whole scheme of improvement may be provided for in one proceeding.

On the other hand, the contradictory view may be maintained that the widening, the elevated structure, and the construction of the bridge are each separate and distinct improvements not mutually dependent upon each other, nor directly connected, and all of which do not confer benefits on the same territory. In other words, it may be said that these are three distinct improvements and that if they were united in a single ordinance that would not change their independent character and render them component parts of a single improvement. It would be argued that although it were true in some cases that improvements which might be separate and independent if constructed alone could be merged into and become component parts of a single and more comprehensive improvement, yet in the proposed scheme of improvement such reasoning would not apply. It could be contended that in the cases where separate improvements would be merged into a single and greater improvement, the latter improvement would have a distinct character and would be susceptible of a name, such as the paving of a street, which might include as an incident of construction a sewer for draining the pavement, but which would be still spoken of as a paving improvement. In this illustration it will be seen that the sewer, which ordinarily would be a separate improvement loses its distinct character as such, and is merged into the pavement as an incident to the construction of the pavement. But it could be asserted, however, that in the proposed improvement, if the widening, the elevated structure and the bridge were united in one ordinance on the theory of a single improvement, this would not produce any known improvement to which a name or term could be given. It might also be objected that these three improvements do not all benefit the same property but that each has its own

benefited district. If these arguments are sound, then it would follow that a single improvement had not been formed by the uniting of the three improvements, but that three improvements had simply been combined in a single ordinance. Such a proceeding would be invalid and in violation of the decisions of the Supreme Court of this State, which held that only one improvement can be included in a single ordinance.

We do not deem it necessary to go into an extended review of the authorities on this proposition. There can be no dispute about the general rule of law that improvements known as double improvements when provided for in one ordinance render the ordinance invalid.

As to what constitutes a double improvement, the authorities are not clear and definite. As far as we have been able to discover, the Supreme Court has not attempted to give a precise definition of a double improvement. It may be that the term is not susceptible of exact definition, but must depend on the particular facts in each case; yet, as we have stated, we cannot find that the Supreme Court has clearly formulated any general principles which we could apply to the facts.

In the case of *Murphy v. City of Peoria*, 119 Ill. 509, where an ordinance provided for the graveling of the road, the sodding of the center of the street and the putting of a sewer under the street the court said (p. 512) :

“The three elements required, when all united, made the improved street contemplated by the ordinance. A projected improvement may often contain several elements, but when they are all united they constitute a single, whole, one improvement. Such is the case here. The improvement consisted of three elements, but when the work is all done there is but a single improvement.”

In the case of *City of Springfield v. Green et al.*, 120 Ill. 269, where the ordinance included the paving of several streets, the court said (p. 273) :

“The City authorities in adopting the ordinance must have found as a matter of fact that those streets and parts of streets were so similarly situated with respect to the improvement proposed to be made as to justify treating them as parts of a common enterprise and single improvement, and from the record before us we think they were justified in doing so. * * * The similarity of the

improvement proposed to be made and the situation of the property to be assessed with respect to it offer a more satisfactory test as to whether they might all be embraced in a common scheme as one improvement, than their actual connection or physical contact with one another."

In the case of *Church v. The People*, 179 Ill. 205, where it was objected that the ordinance which provided for a sewer was double, the court said (p. 206):

"If it appears an ordinance provides for two separate and distinct improvements, the making of one of which would not reasonably be said to benefit property situated upon the other, the combination of the improvements would be regarded as a clear abuse of discretion."

In the case of *Weckler v. City of Chicago*, 61 Ill. 142, the ordinance provided for the widening of an alley running north and south through the block and the opening of a new alley running east and west through the same block, and also the condemnation of two triangular pieces of land at the intersection of those alleys for the purpose of improving the ingress and egress to and from the alleys. It was held that these were separate and distinct improvements and could not be united in one proceeding; that in assessing benefits, property owners would be liable to assessments they would not have to bear if the improvements were made in separate proceedings. In deciding this question, the court said in part (p. 147):

"When the north and south alley was ordered to be widened ten feet the land requisite for that purpose, when taken, was appropriated for the improvement of widening that alley. The land taken to widen that alley was not appropriated for the improvement of opening a new alley sixteen feet wide and running east and west. When the amount of damages was found in favor of a party whose land was appropriated for widening the north and south alley, such damages were subject to no diminution for benefits except such as were derived from the improvement for which that party's land was appropriated and it would have been a violation of the principle of the 7th section above quoted to diminish such damages by supposed benefits derived from the other improvement of opening the new east and west alley; and, for the same reason, damages for the value of land appropriated for

opening the east and west alley, could not be lawfully diminished by either theoretical or actual benefits derived from the widening of the north and south alley, simply because widening the latter alley is not the improvement for which the lands taken to open the former were appropriated."

In the case of *Village of Hinsdale v. Shannon*, 182 Ill. 212-316, it was held on the facts in that case, that a system of sewers which had no physical connection did not constitute a double improvement.

It also has been held that a berme which is "defined to be a horizontal ledge or shelf at the bottom or part way up a bank or slope," and which in some instances is necessary to the proper construction of a sidewalk, is no part of the sidewalk, but is a separate improvement for which a public hearing is required.

Village of Glencoe v. Uthe, 253 Ill. 518-525.

People v. Klehm, 238 Ill. 89, 91, 92.

There are numerous other decisions of the Supreme Court on this question, but we do not think that any of them furnish a clear comprehensive principle which would enable us to express with confidence a definite opinion on the question.

From these authorities, however, we think it may be said that in determining whether an improvement is double or single, we are justified in considering both the physical construction of the improvement and the question of benefits to the property proposed to be assessed for the improvement. When we speak of physical construction, we do not mean necessarily actual physical connection of all the parts, but an interdependence of all the component parts. (*Village of Hinsdale v. Shannon*, 182 Ill. 312-316.) We do not wish to be understood as holding that there are two separate and independent tests for a double improvement, namely, physical construction and benefits, but we are of the opinion that the two questions must always be considered together.

It is plain that if an ordinance provided for several improvements which, when united, are merged into a larger and single improvement, all the parts of which are so dependent upon each other that in their physical construction they are necessary to constitute the one improvement, such an ordi-

nance, when tested on the ground of physical construction, would be valid and not open to the objection of double improvement. If, on the other hand, an ordinance included several improvements which were not physically related or dependent upon each other, but which it was desired to construct in order to accomplish a single object, such for instance, as a completely improved street, could the test of benefits be resorted to in order to determine whether or not such an improvement was a single or double improvement? Could we go into the question whether all of the property which could be included in the district assessable would be benefited by each of the improvements included in the ordinance which purported to provide for the common scheme? If all of the property which would be embraced in an assessed district would be benefited by all of the improvements which might be included in a single ordinance, then it might be argued that such a scheme did not involve a series of improvements, but a single improvement from which all of this property derived a common benefit. But, this would be determining the question whether such a plan involved a double or single improvement by the test of benefits alone. In other words, it would be assuming that because all of the property derived a common benefit from all of the improvements which were united in the ordinance, therefore those improvements were merged into a single improvement and constituted one scheme or enterprise. But, is this a fair and reasonable method of distinguishing between a single and double improvement? The mere fact that certain property would be benefited by several improvements would not necessarily convert those improvements into a single improvement. It might be that the same property adjacent or contiguous to a street would be benefited by separate and distinct improvements which, from their very nature, could not possibly be united in such a manner as to constitute any known single improvement. It is true, generally speaking, that when all of the usual street improvements are put into a street, there would result a completely improved thoroughfare. But the mere fact that the thoroughfare would be entirely improved by having had all the improvements placed in it of which it was susceptible, would not justify the argument that

all of those improvements could be combined in one proceeding. Or, to put it another way, because there may be one unified plan in contemplation by the municipality, can it be reasonably and fairly argued that on account of this mental attitude, as it were, of the municipality, all of the improvements which would be included in such a scheme would therefore be interdependent and directly related with each other?

Applying these general expressions to the present case, from the aspect of the construction only, it may be asked, first, would the bridge, the elevated structure and the widening of the street be physically connected with one another? And, second, if there is no actual physical contact, are these several improvements so mutually dependent upon one another as to constitute a single improvement?

The elevated structure and the street as widened would be physically connected, for the structure as planned could not be built unless the street were widened to the extent proposed. The bridge and elevated structure are also physically connected. Possibly it may be fairly stated that the bridge and the street as widened would also be physically connected because the bridge serves as the connection between the widened portions of the street on either side thereof. If this view is correct, then there would be physical connection between all the parts of the improvement.

But would they be so mutually dependent upon one another as to form a single improvement? In other words, could not one of these improvements be constructed alone, independently of the others? It is clear that the elevated structure could not be erected as planned unless the street is of the width proposed; and the usefulness of this structure would be substantially diminished or impaired without the connection supplied by the bridge. But is all of the land proposed to be taken necessary in order to enable the structure to be constructed? Will the structure extend along the street to the distance the street is intended to be widened? The questions, in my opinion, would have to be answered in the affirmative before it could be said that the structure would be so related to the condemnation for the land as to admit of its being included in that proceeding. Whether the bridge would have

a direct relation to the street as widened would, on the same principle, depend upon whether the bridge was to be as wide as the widened street, and also whether the amount of land taken for the widening was necessary for the construction of the bridge. If the bridge is to be as wide as the widened street and if the amount of land taken is required in order that the bridge may be built, it may be said that the acquisition of the land by condemnation for the street widening is related to the bridge. If, however, the bridge would not be as wide as the widened street, or if the amount of land taken for the widening of the street is grossly in excess of what is needed for the construction of the bridge, then in either case it could not fairly and reasonably be maintained that there would be a mutual dependence between the bridge and the condemnation for the street widening.

Benefits in a special assessment proceeding could not be levied to pay for taking land which was not necessary for the construction of the bridge and the elevated structure. Of course, there would be a large discretion resting in the municipal authorities as to what would be the proper amount of land to take, and their judgment would not be reviewable except for clear abuse of discretion. (*C. & W. I. R. R. Co. v. City of Chicago*, 255 Ill. 136.) In respect to the bridge it would seem that no more land would be actually required than is necessary to serve as approaches to the bridge. The taking of additional land along the street to the distance that the proposed widening is to extend would not be necessary to the construction of the bridge, and could not be said, except in a strained and technical sense to be taken for the bridge improvement. If this view is correct, how could the bridge be included in the proceeding to condemn for the street widening which proposes to take more land than is needed for the approaches? Could the same ordinance include a provision for the construction of the bridge on the theory that it is a necessary incident to the street improvement because it will supply a connection across the river and make a united thoroughfare? If this proposition were granted for the sake of argument, the further question arises whether the bridge could be paid for by special assessments levied in that same proceeding. To

such a levy it might be objected that the amount of land taken was grossly in excess of what was needed for the bridge and that an assessment for such excess would be invalid. It is true that it could be argued that the bridge would be necessary in order to have a connected thoroughfare, on the same principle that the removal of buildings would have been necessary to the street opening in the case of *City of Chicago v. Kemp*, 240 Ill. 56, in order to render the street available for public travel. But the *Kemp case* does not hold that because the removal of the buildings should have been provided for, before the assessment to pay for the land taken could be levied, that also the cost of such removal could be defrayed by special assessment in the same proceeding as the condemnation of the street opening. And in the present case, even though the bridge may be necessary to make a connected street, yet it could not be said that all the land proposed to be condemned is necessary for the construction of the bridge in the sense that the two improvements, the construction of the bridge, and the condemnation for the street widening could be joined in one proceeding.

So far we have considered the question as to whether the improvement would be single or double principally in regard to construction. Now, let us view it from the standpoint of benefits. This involves a question of fact which must be determined by real estate experts. The controlling principle governing this question of fact, generally stated, would be this, that the property in the territory which would be defined as the assessable district would all have to be benefited by each one of the three improvements. We think it would be permissible in this case to apply this test, for the reason that each one of the improvements could be a distinct entity in itself, and each could confer special benefits upon certain property. In separating these improvements, and considering each in relation to the benefits that it might confer on property in the assessed district, it cannot be properly said that we are taking one part of the improvement from the whole improvement and considering benefits in relation to that part alone. That would ordinarily be erroneous. But this proposed improvement would differ from the usual one in which

the various parts of the improvement would not separately and alone be of any use or benefit to the property in the assessed district. We think then that this method could be used as one of the tests to aid in determining the question whether the improvement is single or double. If, for instance, the bridge alone would benefit certain property which would not be benefited by either the widening of the street or the elevated structure, it might be said that there was not a common or mutual interest in benefits and consequently there was not a single improvement. On the other hand, if the same property would be benefited by the improvements united as would be benefited by the improvements singly, there would be a mutual and common interest in benefits.

We think we have suggested most of the arguments that may be advanced on both sides of the question of double or single improvement, and have presented the various aspects from which it may be viewed. It will be seen that it is a close question. It is also one which has never been decided by the Supreme Court.

Briefly stating again, the general principles which in our opinion control the question they are as follows: That in order for the present improvement to be held to be a single improvement, it must appear that either the improvement when constructed would constitute an improvement that is known by a name or term, or that the parts which it is intended to unite in one improvement are mutually interdependent; further that each of the improvements which go to make the whole improvement must benefit the same territory, and that the improvement as a whole must benefit all of the property in such a way that if any component part were omitted, the benefit to all of the property would be affected thereby.

Undoubtedly, it would be more expeditious and desirable to proceed on the theory of a single scheme of improvement, if there is a probability that such a procedure would be sustained by the Supreme Court. We realize, however, that there are many serious objections to this plan, both of law and fact. But there are no decisions of the Supreme Court that we can find which expressly prohibit such a proceeding. In a recent

decision of the court in a somewhat analogous case, the question of a more enlarged procedure was referred to but was not decided. The case was that of the *City of Waukegan v. Burnett*, 234 Ill. 460, which was a condemnation proceeding to acquire land for the construction of a system of sewers. The question whether the same ordinance could provide for both the system of sewers and the condemnation of land was not directly involved, but the court stated the question and expressly reserved their opinion upon it. The language of the court in this respect was as follows; (p. 462):

“The questions whether the right of way, the sewer to be laid and the special assessment to pay for the entire improvement must be provided for in one ordinance, or may be provided for in separate ordinances, are not now determined.”

Expressing our own personal view on the question, whether the improvement is double or single, we are constrained to hold that the three improvements cannot be said to constitute a single improvement in the sense that the word “improvement” is generally understood. We are rather of the opinion that the improvements are separate and distinct, and that the object or intent alone is single. We do not think that because the object is single the three separate improvements are transformed into a single improvement. This, in our opinion, is especially true of the inclusion either of the bridge or the elevated structure in the condemnation proceeding for widening the street. If it can be shown that the amount of land taken is grossly in excess of what is needed for the construction of the bridge or the elevated structure, we do not think that either of these improvements could be included in the condemnation proceeding. But there is undoubtedly force to the other side of the argument.

In view of the fact that the question is a close one and that it is much more desirable and expeditious to institute a single proceeding if it can be possibly maintained, we would recommend that the three improvements be combined in one ordinance and conducted in one proceeding. An appeal in respect to a single piece of property could be prosecuted to the Supreme Court without much delay and the question deter-

mined while the rest of the proceeding could remain in abeyance pending the decision of the court.

Perhaps it may be well to add, before concluding the discussion of the question of double or single improvement, that if the three improvements could not be combined in one, at least the bridge and elevated structure could be conducted in one proceeding, and the acquisition of the land for the street widening in another. But a selection of the proper procedure, in the event the Supreme Court should decide adversely to the single plan, could be left until the appeal has been determined.

The third question is as follows: "If the construction of the entire improvement, including the widening, the bridge and the structural improvement, is provided for in one proceeding, the cost thereof to be defrayed by special assessment, is there any manner in which (a) a portion of the cost of the improvement may lawfully be assessed against the South Park Commissioners and the Lincoln Park Commissioners and the same enforced; or (b) an agreement can lawfully be entered into between the City of Chicago and the respective Park Boards whereby these Boards will voluntarily assume a portion of the cost of the improvement? Would the answer to this question be changed if only the widening and the structural improvement, except the bridge, were combined, and separate provision made for the bridge?"

In answer to this question, we are of the opinion that there is no legal way in which an assessment can be levied against the South Park and the Lincoln Park Commissioners. An assessment without their consent would be absolutely illegal, and a judgment of confirmation of such an assessment would be a nullity, for the reason that two distinct municipalities exercising the same jurisdiction in the same territory at the same time cannot assess each other. (*West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392.) Even if they were to consent to an assessment against the property under their jurisdiction, the assessment could not be paid, because such a payment would be an improper use and diversion of the Park funds, since there is no statute expressly authorizing such an expenditure. No agreement which would

be legally enforceable could be entered into between the City of Chicago and the respective Park Boards, whereby the Park Boards would voluntarily assume a portion of the cost of the improvement, for the same reason which would prevent them from paying an assessment, namely, that there is no statute authorizing such a use of Park funds. The same answers would apply to this inquiry even though the widening and structural improvement were combined in one proceeding and provision for the construction of the bridge made in another. This change of plan would not enlarge or affect the power of the Park Boards in regard to the use of their funds for this purpose.

We are unable to find any Park Acts which authorize the expenditure of Park funds for the object in question. The only act which seems to bear in any way on the present question, is an act passed on May 25, 1907, authorizing cities to construct and maintain elevated ways in city streets, and by ordinance to turn them over to Park Commissioners upon conditions fixed by such ordinance. (Hurd's Revised Statutes, 1911, p. 1710.) This act would be of no practical advantage, however, for the reason that the city, in order to obtain such an agreement on the part of the Park Commissioners to pay part of the cost of the elevated structure, would have to contract to turn over to the Park Commissioners such structure; and in order for the City to apportion and spread the cost of the improvement in a special assessment proceeding, it would be necessary for the agreement to be made in advance between the City and the Park Commissioners. If such an agreement were made in advance, it would afford a ground for a serious objection that the improvement was not a local improvement of the City of Chicago, but was in reality a joint improvement of the City of Chicago and the Park Commissioners. Such a joint improvement, under the case of *Loeffler v. City of Chicago*, 246 Ill. 43, could not be legally constructed by special assessment.

There are two other Park Acts which have been suggested as somewhat applicable to the present inquiry, namely, an Act passed June 11, 1912, authorizing the Park Commissioners to connect two separate public parks bordering upon

public waters by a driveway, and an Act passed on May 25, 1907, authorizing cities to grant to Park Boards the right to improve streets by constructing surface and elevated ways. In our opinion, however, these Acts do not assist in any way in securing a contribution or payment of any part of the cost of the improvement from the Park Commissioners. They simply confer power upon the Park Boards to make certain improvements themselves, and do not authorize a payment of a part of the cost of an improvement conducted by another municipality. Furthermore, the improvements authorized to be made by the Park Commissioners would be confined to their respective jurisdictions, and there would be no way of compelling any co-operation between the Park Boards which would assist in realizing the unified and single plan of improvement contemplated.

If the views expressed are correct, it is evident that enabling legislation must be obtained before the Park Boards can lawfully contribute to the cost of the proposed improvement. It is perhaps true that legislation in respect to Park Boards may, to a certain extent, be special and still not within the constitutional prohibition against special legislation. (*Commissioners of Lincoln Park v. Fahrney*, 250 Ill. 256, 263, 264.) If this is correct, special acts relating to the South Park and Lincoln Park Boards could be passed. But it would be the safer and better policy to make the Act general as to certain classes of Park Boards, without specifically naming any Park Boards. In practical operation the Act would include, perhaps, only the South Park and Lincoln Park Boards; but under the Fahrney case *supra* this would not render the Act invalid.

The legislation which I would suggest, in a general way, would be of such a character as to authorize Park Boards to pay an assessment levied against the property in their jurisdiction to an amount equal to the benefits such property would receive from an improvement constructed by another municipality; and, further, to confer the power on the Park Boards to pay, in addition, an amount in the nature of a public benefit to the Park system under their control which might be determined by them as reasonable and proper. An expenditure

of this kind would not be an arbitrary, unreasonable use of the Park funds, which would amount to a use of the Park funds for other than a corporate purpose, but would have for its basis the theory of benefits to the Park property itself and to the Park system generally to authorize and sustain it.

The following cases will illustrate the purposes which have been held to come within the scope of corporate purposes, and it will be seen that they tend to support the view which we have expressed.

Johnson v. County of Stark, 24 Ill. 75, 87 to 89, and *Q. M. & P. R. R. Co. v. Morris*, 84 *id.* 410, 417, 420, holding the encouragement of railway construction by the issue of public bonds therefor, a corporate purpose; *Butler et al. v. City of Carbondale*, 76 Ill. 455, 463-468, holding the same principle concerning bonds issued for the location of a university in a city; and *Taylor v. Thompson*, 42 *id.* 9, 11-16; *Misner et al. v. Bullard*, 43 *id.* 470, 474-476, and *Johnson et al v. Campbell et al.*, 49 *id.* 316, 317-18, holding the payment of bounties to soldiers a corporate purpose, warranting the extension of taxes therefor.

Respectfully submitted,
(Signed.) FRANK JOHNSTON, Jr.,
Assistant Corporation Counsel.

Approved:

(Signed.) PHILIP J. McKENNA,
Attorney for Board of Local Improvements.
(Signed.) WM. H. SEXTON,
Corporation Counsel.

JANUARY 25, 1913.

HON. RAY PALMER, Chairman, Board of Examiners of Moving Picture Operators.

Dear Sir:

Your request of the 16th inst. for an opinion as to the legality of the requirement of the Board of Examiners of Moving Picture Operators to require payment of back renewal fees where some time has transpired during which no fee was paid, has been referred to me for reply.

The Chicago Code of 1911, Section 1614, provides:

“It shall be the duty of said board of examiners of moving picture operators to examine each applicant for a license as a moving picture operator in regard to his qualifications to operate moving picture machines or devices, and, if found competent, to issue a certificate to such applicant, certifying that he is competent to operate moving picture machines and devices. Such applicant shall then present said certificate to the city clerk, who shall, upon the payment by such applicant to the city collector of an annual license fee of ten dollars, and upon the direction of the mayor so to do, issue to such applicant a license properly attested which license shall expire on the thirty-first day of December of each year. Said license, when issued, shall be posted in a conspicuous place in the box office of the premises where such operator is engaged in operating moving picture machines or devices.”

The above section requires an examination of applicants for a license which, if satisfactory, entitles such applicant to a certificate. If such certificate has been issued, the operator, upon the payment of an annual license fee of ten dollars receives a license to operate.

In cases where such applicant fails to pay the license fee annually as required, but does not engage in the operation of moving picture machines or devices, such applicant should then be submitted to a new examination or must pay up the unpaid fee.

Yours very truly,
LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

JANUARY 25, 1913.

HON. G. B. YOUNG, Commissioner of Health.

Dear Sir:

In your communication of December 9, 1912, enclosing copy of a letter from Mr. Leon L. Loehr, Secretary of the Merchants Loan & Trust Company, relating to the subject matter of your communication, you inquire what is the proper

course for the city to take towards abating a nuisance under the following circumstances.

The offices above the 8th floor at 77 East Monroe street, a fifteen story building, are rendered almost uninhabitable at times by the smoke and fumes from two smoke stacks and one kitchen fan at 107 Wabash avenue directly across the alley. The owner of the latter piece of property is a non-resident and the Merchants Loan & Trust Company is the agent of the non-resident owner authorized only to receive the rents and accounts for the same to the owner. That building, however, is occupied by two tenants, Messrs. Stumer, Rosenthal & Eckstein and the A. H. Andrews Company.

From a conversation with Mr. Bell of your department, as well as from the contents of your communication, we assume that the nuisance is not caused by the emission of dense smoke in violation of the ordinance.

Under Section 1427 of The Chicago Code of 1911, the duty is imposed upon the Commissioner of Health to serve notice in writing upon the owner, *occupant*, agent or *person in possession*, charge or control of any lot, building or premises in or upon which any nuisance may be found, and it is further provided that if the nuisance is not abated within the time specified in the notice, the person notified shall be subject to a fine.

Section 1425 of The Chicago Code of 1911 is as follows:

“1425. MATTERS AND THINGS DETRIMENTAL TO HEALTH.) No building, vehicle, structure, receptacle or thing used or to be used for any purpose whatever, shall be made, used, kept, maintained or operated in the city, if the use, keeping, maintaining or operating of such building, vehicle, structure, receptacle or thing shall be the occasion of any nuisance, or dangerous or detrimental to health.”

Section 1430 of said Code reads as follows:

“1430. FACTORY, ETC.—NAUSEOUS OR OFFENSIVE.) Any factory, yard, building or structure of any kind, or tallow chandler's shop, soap factory, tannery, distillery, livery stable, cattle yard or shed, barn, packing house, slaughter house or rendering establishment which shall become nauseous, foul or offensive, is hereby declared a nuisance, and the person or persons owning, keeping or

maintaining or in possession, charge or control of any such factory, shop, yard, house, building or structure aforesaid, shall be fined in a sum not less than twenty-five and not exceeding one hundred dollars for each offense."

If the nuisance referred to can be abated at all, it must be done under the sections of the Code of Chicago hereinabove referred to. It must be apparent that it is not unlawful to maintain a building of the character described. If the nuisance exists, it is by reason of the fact that the use of the property to which it is put is of such character as to cause public annoyance or to endanger public health. It seems to us, therefore, that the responsible person or persons in this case are the occupants of the building.

We appreciate that this may impose a hardship upon short term tenants who might be required to make permanent improvements upon the property in question, or to stop doing business in the premises if their business is of such a character as to necessitate the emission of fumes and smoke which affect the physical comfort or endanger the health of the public in the immediate vicinity of said building. But these are questions which may be more readily solved by the landlord and tenant. The duty should not be imposed upon the city to look to the equitable adjustment of the property rights or contractual obligations between its citizens. Its only concern should be the protection of the public health and comfort and to impose a liability for any violation of its ordinances upon the person or persons legally responsible therefor.

We do not, however, in this case presume to pass upon the question whether it is advisable for the city to abate the nuisance or whether the adjacent property owner should be left to his private remedy. If the nuisance exists the owner or occupants may by proper legal proceedings have the same abated, whereas the city might have considerable difficulty in establishing the existence of a *public* nuisance.

Respectfully submitted,

JOSEPH F. GROSSMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 25, 1913.

HON. JOHN McWEENY, General Superintendent of Police.

Dear Sir:

I am in receipt of your letter of the 13th inst., attached to which is a letter from Captain Thomas F. Meagher, requesting an opinion as to whether or not Frank Parmelee Co. should be compelled to procure frontage consents before constructing a garage at 1117 to 1145 W. Monroe street, and in reply thereto state the following:

There is in full force and effect in Chicago the following ordinances as contained in the Chicago Code of 1911, (Art. VIII, p. 839):

“Sec. 2683. Garage defined.) The word ‘garage’ as used in this article shall be held to mean, and is hereby defined, as meaning, any barn, stable, building or other place within the city where automobiles, autocars or any similar self-propelled vehicles are kept or let for hire or reward to any person, whether such vehicle be so hired out or let with or without an operator for same, or where such vehicles are kept ready for use and where rent is paid to the keeper thereof for such keeping.”

“Sec. 2684. Garage to be licensed—frontage consents.) No person, firm or corporation shall keep, conduct or operate a garage in this city without first obtaining a license so to do in the manner hereinafter provided, and it shall not be lawful for any person, firm or corporation to locate, build, construct or maintain any garage within two hundred feet of any building used as and for a hospital, church, or public or parochial school, or the grounds thereof, nor shall any person, firm or corporation locate, build, construct or maintain any garage in the city in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, or within one hundred feet of any such street in any such block, without the written consent of a majority of the property owners according to frontage on both sides of the street.

Such written consent shall be obtained and filed with the commissioner of buildings before a permit is issued for the construction of any such building; provided, that in determining whether two-thirds of the buildings on both sides of such street, are used exclusively for residence purposes, any building fronting upon another street and located upon a corner lot shall not be con-

sidered; and provided, further, that the word 'block,' as used in this section shall not be held to mean a square, but shall be held to embrace only that part of the street in question which lies between the two nearest intersecting streets, one on either side of the lot on which said garage is to be located, built, constructed or maintained."

FIRE PREVENTION ORDINANCE.

Article X, page 1574, (Council Proceedings of July 22, 1912), Provisions relating to garages:

"Sec. 144. Definition.) The term 'garage' as used in this article shall be taken to mean a building, or that portion of a building, wherein are kept five or more automobiles or motor cars charged with or containing a volatile inflammable liquid for fuel or power."

"Sec. 145. Part of Building Used for a Garage.) Where any portion of any building is used for a garage, the garage shall be deemed to embrace all of the building not separated from the garage proper by walls of brick or concrete extending three feet through the roof. All openings in such walls shall be protected on both sides by approved automatic fire doors constantly closed except when necessarily temporarily opened for passage."

"Sec. 147. Garage Limited to One Story—Exception—No Basement Allowed—Exception.) No building exceeding one story in height shall be used as a garage within the City of Chicago, unless such building be of fire-proof construction throughout, and no building used for a garage shall have a basement, except one of such dimensions as shall be approved by the Chief of Fire Prevention and Public Safety and said basement shall be used for no other purpose than for that of a boiler room heating the building; and shall have no opening to the first floor."

The first question that presents itself is, what is meant by the terms "hire" and "reward."

The word "hire" is a reward or compensation paid for the possession or use of personalty. Words and Phrases, Vol. 4, page 3309, citing *L. L. L. Co. v. Fowler*, 19 South, 396, 398, 109 Ala. 169; *Bledsoe v. Nixon*, 69 N. C. 89-91; 12 Am. Rep. 642.

Hire, "to engage the use for a consideration; agreement to pay a price or give an equivalent for the use of; as to hire a horse or carriage." Century Dictionary, Vol. 3, 179.

Hire signifies "a reward or recompense for the use of a thing and is so used in an indictment charging that persons were permitted to play and bet on the result of games." *Carr v. State*, 50 Ind. 178.

The word "hire" therefore, signifies, in my opinion, a recompense for the use of automobiles, and if, in this case, it appears that said Frank Parmelee Co. intend to carry passengers or trunks for compensation, their acts fall within the purview of Section 2683, otherwise not.

The next question is as to what is meant by the term "reward."

"Reward" in an ordinance prohibiting any person from running any hack, carriage, dray, sprinkling wagon or other vehicle for reward without a license, is applied to such vehicles as are run for the accommodation of the public and for the use of which a fee is charged to the person using them; and therefore wagons used by coal merchants to deliver coal sold by them are not public vehicles or wagons within the meaning of the statute. *Henderson v. Marshall*, (Ky.) 58 S. W. 518.

The word "reward" named in said Section 2683 may be safely interpreted as synonymous to "hire" and consequently the same meaning applies herein.

The next question involved relative to frontage consents, as stated in Section 2684 is this:

Are two-thirds of the buildings on both sides of the street in the block in question used exclusively for residence purposes?

This is a question of fact to be determined by other officials. In *City of Chicago v. Stretton*, 162 Ill. 494, an ordinance similar in effect to Section 2684 was upheld as valid.

The Supreme Court of Indiana, in case of *Shea v. City of Muncie*, 46 N. E. 138, 148 Ind. 14, have, in effect said a "residence portion" contained in an ordinance is not necessarily an exclusively residence district. That was a case relative to an ordinance prohibiting sales of liquor "in the residence portion of the city." An exception was taken to an instruction of the court as follows:

"* * * 'if a certain part of the city, large or

small, is principally and chiefly used for residence purposes, families residing and having homes therein, such part of the city would not become a business portion of the city merely because a grocery or other business was here and there carried on therein. The decided preponderance of residences and families residing therein determines the character of said portion of the city.' "

The Supreme Court upheld that instruction and used the following language:

"If that is not a correct statement of the law upon the subject, then it seems to us that there is no fair way of determining what is meant in the statute, and the ordinance authorized thereby, in the use of the words 'residence portion of such city.' Does one family grocery in the residence portion of a city convert that portion into what the statute means by the words 'the business portion of such city?' And does one family residence in the business portion of a city convert that part thereof into a residence portion of such city? Most certainly not. Because if both of these questions may be answered in the affirmative, then it will appear that in very rare instances will any city have either a business portion or a residence portion thereof. In other words, all parts of all cities will be residence portions, and the same parts will be business portions thereof. This makes nonsense out of the language of the statute and of the ordinance. The framers of the statute and of the ordinance must have had in mind the common understanding of the import of the words or phrases used in 'business portion' and 'residence portion' of a city. And that idea was correctly enough expressed in the instruction so that the jury could apprehend it."

I am of the opinion, therefore, that the above ordinance governs in this case, and that the garage should not be allowed to be built unless it can be shown that more than one-third of the buildings in the block are not used exclusively for residence purposes, or, unless Frank Parmelee Co. can show that their automobiles are not to be used for "hire" or "reward."

If, however, the written consent of a majority of the property owners according to frontage on both sides of the street is first had and obtained, and if the said fire ordinance is com-

plied with, then and in such event all legal obstacles will be removed and said garage should be allowed to be constructed.

Yours respectfully,

EDWARD J. QUEENY,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 27, 1913.

HON. WILLIS O. NANCE, Alderman, Sixth Ward.

Dear Sir:

Your letter asking for an opinion as to the power of the City of Chicago to provide for a public comfort station under the sidewalk at Randolph street and Garland court, to rent space in the same for bootblack stands, news stands, etc., and to charge a fee for the use of some of the lavatories contained therein, has been referred to me for reply. I shall take up these questions in the order above enumerated.

Hurd's Revised Statutes of 1911, Chapt. 24, Art. V, Sec. 1, gives the city power by:

"Clause 78. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease."

"Clause 66. To regulate the police of the city or village and pass and enforce all necessary police ordinances."

"Clause 86. To provide for the erection and care of all public buildings necessary for the use of the city or village."

In *Gundling v. City of Chicago*, 176 Ill. 340, the court sustains the validity of an ordinance limiting the sale of cigarettes, and restricting the place of sale of same, and says on page 348:

"Paragraph 66 before quoted, expressly authorizes the adoption of ordinances necessary to police power, and paragraph 78 is an express authorization of the city council to make all regulations necessary or expedient for the promotion of health or the suppression of disease. Under these two provisions express authority is granted the municipality to pass all ordinances or requirements tend-

ing to promote the public health, morals, security, comfort and welfare of the community. Such legislation is included within the provision authorizing the enactment of police regulations. The most important of police powers is that of caring for the health of the community, and that is inherent in a municipality, and may be exercised whether expressly granted or not, because the preservation of the health of the public is indispensable to the existence of the municipal corporations."

See also:

Chicago v. Gunning System, 214 Ill. 628, 638.

Chicago v. Bowman Dairy Company, 234 Ill. 294.

In *Santa Barbara v. Davis*, 142 Cal. 669, the court held that a municipality under powers similar to those given by Clause 86, *supra*, may purchase a site for a fire engine house, no other power being given.

In *City of Lexington v. Kent Chautauqua Assembly*, 114 Ky. 781, the court held that a city having the power to acquire property for municipal purposes could purchase property for a public park, and said:

"The health and comfort of the inhabitants of the city is necessarily one of the chief concerns of a municipal government. No one at this late date would for a moment question the power of a city to furnish pure water, light, clean streets and proper sewerage, and the obligation to furnish pure air and a place for healthful exercise and recreation stands upon the same footing and is a city purpose."

See also:

Holden v. City of Yonkers, 39 N. Y. App. 1.

While I have been unable to find any cases holding that a public comfort station may be erected and maintained by a municipality without express authority, yet in view of the above cases I think it can be fairly inferred that their establishment and maintenance is a municipal purpose.

I am, therefore, of the opinion that the city has the power to erect and maintain such public comfort stations.

As to the right of the city to rent out space in such public comfort stations, I call your attention to the fact that in establishing public comfort stations future needs may be

taken into consideration and such space as is not at the time required for lavatories, etc., may be used incidentally for private purposes for compensation.

Dillon on Mun. Corp., 5th Ed., Sec. 997, page 1594-6, it is said:

“In erecting or acquiring public buildings for corporate purposes a municipality is not restricted to its present necessities, but may anticipate and make provision for its reasonable future necessities. Although the building may be held for public use, the municipality may allow the entire building, or a part thereof, to be used incidentally for private purposes for compensation, and may make leases of surplus space for the purpose of deriving an income therefrom, provided, always, such private use or such leases do not interfere with the application of the building to the legitimate public needs of the municipality. But although the municipality may make reasonable provision for future wants in erecting a public building and may lease the surplus space resulting therefrom, it will not be permitted under cover of so doing to erect a building not in fact for public needs as they may arise, but for the express purpose of devoting the building to private purposes, wholly or in part.”

On this point I must conclude that the city has the power to rent or lease such space in proposed public comfort stations as is not required for public use.

On the question as to the power of the city to make a small charge for the purpose of covering or helping to cover the expense of maintaining such lavatories, I refer you to the case of *Tollefson v. City of Ottawa*, 129 Ill. App. 139, in which the plaintiff contended that the erection and maintenance of a hospital by the City of Ottawa was for its own private purposes, inasmuch as charges were made by such hospital, but in which the court says, on page 141:

“The object for which it is established is for the preservation of the public health. The very nature of the functions of a hospital shows at once that it is for the benefit of the public health. The fact that patients who are able to pay are required to do so does not deprive the hospital of its eleemosynary character, or permit a recovery for damages on account of the contract relations. *Parks v. Northwestern University*, 218 Ill. 381. The amounts thus received are not for private gain, but

contribute to the more effectual carrying out of the purpose for which the hospital was founded. Better facilities for the care and treatment of the sick, both of the poor and those who are able to pay, are secured by the establishment of hospitals like that of defendant. Also facilities are increased by the receipt of the money from those who are able to pay in whole or in part for the benefits received. The fact that the work done at the hospital may be incidentally commercial in its character, make it no less a public work. The element of commercial advantage or pecuniary profit to the city is not so as to render the maintenance of the hospital for its private use. Every one is aware that the money received from the patients of a hospital does not fully compensate for the treatment administered. Should there be any revenue derived, it tends to some little extent to lessen the public taxes paid by the citizens. A city hospital is open to all, and the treatment is the same whether the patient pays or not. Compensation is never a condition precedent to the entering into and receiving the benefits of a city hospital."

This case was taken to the Supreme Court and reported in 228 Ill. 134, where the court sustained the Appellate Court in holding that the hospital was erected and maintained by the municipality in the exercise of its police power, but does not decide whether or not the exactment of reasonable charges for the use of same is legal. The court there says, on page 137, that:

"The city did not possess the power, in its private or proprietary capacity to engage in the business of conducting a hospital *for revenue*."

As it is not the purpose nor intention of the city to conduct the proposed municipal public comfort station for revenue or profit, but rather for the comfort and promulgation of the health of the citizens of the community, and the charges are made incidentally for the purpose of contributing to the maintenance of the same, I am of the opinion that the city may make a reasonable charge for the use of the lavatories maintained therein.

Yours very respectfully,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 27, 1913.

DR. G. B. YOUNG, Commissioner of Health.

Dear Sir:

The City Council on October 7, 1912 (C. P. 1924) authorized and directed you to advertise for bids for the work of removing night soil, and at the same time directed the Corporation Counsel to prepare and submit the necessary amendments to the Code so that you could legally award such contract.

While the wording in each case is somewhat vague, so that neither of the two orders indicates clearly what the intention of the City Council is, we gather from your letter and from inquiries received concerning same that it is the intention to establish a monopoly of the business of removing night soil, which is to be handled at a price to be fixed by contract with the city, the contractor to be paid by the property owner or lessee of the premises as the case may be.

Such a proceeding would be contrary to law. It is beyond the power of the city, as defined in the case of *Landberg v. City of Chicago*, 237 Ill. 112.

We had occasion to advise you some time ago that the city had no right to fix the compensation of night soil scavengers by ordinance, and in doing so pointed out that while the powers of the municipality are very broad in relation to a matter so closely allied to the health of the community, yet it could not go so far as to create a monopoly in this business.

Some confusion has existed in regard to this point, because there are many cases where the creation of a monopoly of a similar character by the municipality has been upheld. But our Supreme Court has cleared up the situation by pointing out that in those cases the power to do so was given by an express grant of the legislature, and, therefore, it was proper to go so far as to create a monopoly in a business which might endanger the health of the community. But this power is vested in the legislature and cannot be exercised by the municipality unless it has been expressly delegated. Since no such power has been given to the city by express grant, it cannot make a contract which will place a monopoly of this business into the hands of the contractor.

In the *Landberg* case, the question hinged on the right of the city to create a monopoly in the handling and removal of manure. The case is, therefore, similar to that presented here. The court said, on page 118-9:

“There have been a number of cases where the grant of a monopoly for the removal of garbage, dead animals or other substances constituting a menace to public health have been sustained, but ordinances were expressly authorized by the charter of the city or the monopoly was essential to accomplish the intended purpose. In *Walker v. Jameson*, 140 Ind. 591, a contract of the City of Indianapolis clothed the contractor with the exclusive right and obligation to remove the garbage from the premises of all persons in said city and to transport the same through the streets thereof to the crematory. The contract fixed the price for removal of garbage and permitted the contractor to collect the same from the householder, and the question whether the contract was valid arose between a property owner and the contractor. It was expressly authorized by the charter. In *Smiley v. McDonald*, 42 Neb. 5, the suit was by a citizen and tax-payer of the City of Omaha to restrain the defendant from proceeding under a contract with the city providing for the removal of garbage, offal, night soil, dead animals, etc., from the city, and the contract was within the strict letter of the city charter. The same is true of the *Slaughter-house* case, as was pointed out in *Huesing v. City of Rock Island*, 128 Ill. 465. Cases of that character do not involve the question with which we are concerned in this case. The question here is whether an ordinance granting an exclusive privilege to some contractor who will pay for it, with the effect of destroying the complainant's legitimate business, is reasonable. To hold it unreasonable does not impair the power of the City of Chicago in any respect to perform all its legitimate functions for the preservation of the public health, all of which may be performed without unreasonably interfering with individual rights.”

In passing on questions relating to the same subject matter this department has held that the city has a right to do this work itself and charge the owner a reasonable fee for the service, although it is doubtful whether it can do this to the exclusion of others. We have also held that the city may do this work free of charge, if it sees fit, on the theory

that, like the removal of garbage, the removal of night soil is one of those essential duties which the municipality cannot evade, and must perform with a view to preserving the health of the community even if it relieves the property owner of a duty which he should himself perform.

Since the municipality may itself do this work, it follows that it may contract with some one to have the work done, but in such a case the owner cannot deal directly with the contractor, and the contractor cannot be given the exclusive privilege.

Such being the case, there is no reason at the present time for amending the ordinances. If anything short of creating a monopoly is contemplated, it can be done without altering the Code.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 27, 1913.

HON. RAY PALMER, City Electrician.

Dear Sir:

You state in your letter dated November 27, 1912, addressed to this department, that an application has been made for a permit to erect an illuminated sign, flat against one side of the pent house on the top of the roof of the Boston Store, seventeen stories above the street level.

You desire an opinion as to whether your department can treat this sign as a "flat sign" or a "roof sign."

Section 710 of the Chicago Code of 1911 contained in Chapter XVI on "Buildings" provides that "* * * no such illuminated roof sign shall be constructed on any building or structure which is over eight stories in height * * *"

The subject of "Illuminated Signs" is also treated in Article II of Chapter XXIV on "Electricity." Section 851 in this article relates to fees "* * * for all signs placed against a building and running parallel thereto * * *"

Apparently no restriction is contained in this article as to the height of such signs above the level of the street.

The question, therefore, arises whether the sign proposed to be erected on the top of the roof of the Boston Store flat against the pent house is a roof sign or a flat sign. If it is to be construed as a roof sign then the erection of such sign would be in violation of Section 710 aforesaid, which provides that “* * * no illuminated roof sign shall be constructed on any building or structure which is over eight stories in height.”

While this sign has some of the characteristics of an illuminated roof sign, nevertheless such sign may be treated as a flat sign under the provisions of Article II of Chapter XXIV aforesaid.

A reading of Section 710 bears out the view that it was not intended in enacting said Section 710 to include signs placed flat against any portion of a building and running parallel thereto.

Some question arises in the present case by reason of the fact that the particular sign is to be longer than the side of the pent house to which it is attached protruding on each side for some distance. The Building Commissioner fears that a sign so protruding is dangerous at a great height on account of wind pressure. Since the sign protrudes on each side of the wall of the pent house, it takes on the features of *flat signs* and *roof signs*.

It is our opinion that if application is made for an illuminated sign which does not protrude beyond the sides of the pent house to which it is fastened, you would have the right to issue a permit for same. To the extent that such sign extends substantially beyond the sides of the pent house, the parts of said sign so extending should be considered as illuminated roof signs subject to the provisions of Section 710 of the Code.

This opinion is in consonance with an opinion of this

office addressed to William Carroll, City Electrician, dated October 24, 1910.

Yours respectfully,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 28, 1913.

HON. JOHN E. TRAEGER, City Comptroller, Chicago.

Dear Sir:

In reply to your communication of January 27, 1913, inquiring as to the status of police operators under the ordinance, passed by the City Council of the City of Chicago, on December 30, 1912, amending The Chicago Code of 1911 relating to the Police Department, we have the honor to advise you that by Section 1908 of The Chicago Code of 1911, as amended, operators are designated as "policemen" and are made a constituent part of the Police Force of the City of Chicago.

The office of operator is not, however, created in the ordinance as amended, and we are of the opinion that while they may be designated as "policemen," they are not, under the present condition of the ordinance police officers, commonly known as "policemen" within the purview of the Police Pension Act.

It must be assumed that the legislature in using the word "policemen" in the act creating the Police Pension Fund had in mind only such policemen as are known to the law.

In view of the obligations imposed by statute upon policemen—that is, to make arrests, to preserve the peace, and to enforce the state laws within their jurisdiction—they must be *officers of the law* and sworn in as such. Inasmuch as the ordinance referred to does not create the office of operator, the designation by ordinance of operators as "policemen" does not constitute them police officers.

We are, therefore, of the opinion that so far as their rights to any benefits under the Police Pension Act is con-

cerned, the status of operators was not changed by the amendment to Chapter LVI of The Chicago Code of 1911, hereinabove referred to.

We are not, however, at this time prepared to determine the question whether or not if the ordinance were amended so as to create the office of operator, operators would then come within the meaning of the Police Pension Act.

Yours respectfully,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 28, 1913.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

The communication of Ricard O'S. Burke, Assistant Engineer, Rivers and Harbor, dated January 23, 1913, transmitting the application of P. J. McDonagh for a permit to protect his water front on Lake Michigan from erosion and to reclaim a strip of land about twelve feet in width torn away by recent storm, has been referred to the undersigned for reply.

This application presents two separate questions:

First. Under the holding of our Supreme Court in the case of *Revell v. The People of the State of Illinois*, 177 Ill. 468, a shore owner's title extends only to the water's edge and he has a right to erect structures on his own land to protect it from erosion if they do not interfere with navigation, but he has no right to build piers or other structures upon submerged land to accomplish that purpose unless authorized by the state. As to this portion of the application we are, therefore, of the opinion that permit may issue to Mr. McDonagh to build such structures on his own land west of the water's edge as will not interfere with navigation. Such permit should comply with the provisions of Section 1127 of The Chicago Code of 1911 and any other requirements of the Code applying to wharves, and further, should contain

the usual conditions imposed by your department for the protection of the rights of the State of Illinois and any municipal corporation of the state;

Second. In regard to Mr. McDonagh's right to reclaim a strip of land about twelve feet in width recently torn away by a storm and of which he states a well-defined line of demarcation is left and that said strip can be identified, we beg to state that our Supreme Court has held in the case of *City of Chicago v. Ward*, 169 Ill. 392, that a riparian owner does not lose his property in the soil by submersion or avulsion if the soil is afterward reclaimed, either by natural or artificial means, nor does the lapse of time during which the soil is submerged bar the owner's rights.

So far as we are informed, this is the only Illinois case bearing upon this proposition. Mr. McDonagh, in his application, refers to said strip of land as being eroded by the recent storm while his statement of facts seems to indicate that it was an avulsion and not an erosion. An erosion is the gradual and imperceptible wearing away of the shore line and the shore owner has not the right to reclaim the land so lost or worn away. An avulsion is the sudden or violent tearing away of a perceptible or considerable portion of the land within a limited or short space of time and it is only in the case of an avulsion that the owner has the right of reclamation.

A careful examination should be made by your department to determine the question of fact whether said twelve-foot strip of land has been carried away by erosion or avulsion and if you determine that the same was by avulsion, the permit for its reclamation should comply with Section 1127 of The Code and should contain such other regulations and conditions as are usually inserted to protect the rights of the State of Illinois and any municipal corporation of the state.

We herewith return to you Mr. McDonagh's application for permit dated January 17, 1913, plat of survey dated January 14, 1913, and blue print dated November 5, 1892, and

letter addressed to Corporation Counsel dated January 7, 1913, referred to in application.

Respectfully submitted,

JAMES G. SKINNER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 31, 1913.

HON. JOHN McWEENY, General Superintendent of Police.

Dear Sir:

In reply to your letter of January 20, 1913, to this office in relation to an automatic gum machine taken from 307 N. Ashland avenue, which D. A. Hughes claims is not a gambling device and demands the possession of said machine, will state that a representative of this office has inspected the machine and finds that the machine requires a penny to be dropped in one of its grooves and in each case the player gets at least what is called a cent's worth of gum, but the machine is so arranged that at very infrequent intervals the coin goes into a groove releasing five, ten or twenty-five cents worth of gum. Also upon verbal information from your department it is stated that one of the exceedingly pernicious effects of this machine is that it is usually placed in the nearest stores to school houses and arouses the gambling instinct in the school children.

It is my opinion that the above described machine is a slot machine or gambling device and is in violation of both the state law and the Municipal Code, as will be seen by the following.

Par. 137f, Section 1, Chapter 38, Criminal Code (Hurd's Revised Statutes 1909) prohibits use of slot or other gambling devices under penalty.

Par. 137g is as follows:

"137g. DECLARED A GAMBLING DEVICE—CONFISCATION.) §2. Every clock, tape, machine, slot machine or other machine or device for the reception of money on chance or upon the action of which money is staked, haz-

arded, bet, won or lost is hereby declared a gambling device and shall be subject to seizure, confiscation and destruction by any municipal or other local authority within whose jurisdiction the same may be found."

Par 137h, penalizes parties having possession of such machines.

In the case of *Bobel v. The People*, 173 Ill. 19, the constitutionality of the above referred to statute was upheld and it is stated therein, on page 27, as follows:

"Evidence was proper to prove the character and purpose of the machine,—that it was a device upon which money is staked or hazarded or upon the result of the action of which money is staked, bet, hazarded, won or lost,—in other words, that it was a gambling device."

In the case of *Lyman v. Kurtz*, 166 N. Y. Reports (Court of Appeals) 274, on page 279, the court describes a nickel slot machine and then states:

"The player stakes or hazards his money on a chance and that is sufficient to make out the gambling. Within the general understanding such a machine is a gambling device. (Citing authorities, among others *Bobel v. The People*, 173 Ill. 20.)"

In the case of *Price v. Burns*, 101 Ill. App., page 418, the litigation is about a slot machine and from the general description therein it is a similar device in its effect as the above described automatic gum machine for the reason that the player thereon received every time he played the machine at least his money's worth and sometimes much more.

Section 709 of the Municipal Code of that time, which is practically similar to Section 980 of our present Code, is quoted, as is also cited Sections 127, 128 and 133 of Hurd's R. S., Ed. 1901, as well as Sections 137f, 137g and 137h thereof, and the litigation therein being for the recovery of the selling price of slot machine, the court, on page 422, says:

"The sale of this machine to appellees, saloon-keepers, was unlawful and the court properly found for defendants."

It has also been held that—

"Whenever money or other valuable thing is hazarded and may be lost, or more than the value obtained,

and depended upon chance, the transaction is gambling. *State v. Smith*, 10 Tenn. (2 Yerg.) 272, 281."

And also—

"The sporting artifice commonly called a 'gift enterprise,' by which a merchant or tradesman sells his wares for their market value, but by way of inducement gives to each purchaser a ticket, which entitles him to a chance to win certain prizes, to be determined after the manner of the lottery, is included within the term 'gambling.' *Bell v. State*, 37 Tenn. (5 Sneed) 507, 509."

Section 984 of the Chicago Code of 1911 is entitled "Tape and Slot Machines Prohibited—Penalty."

I am, therefore, of the opinion that the above described automatic gum machine is a gambling device and in violation of both the Municipal Code and the Revised Statutes as above quoted, and that the same should not be returned to the owner or party claiming possession thereof as under paragraph 137g, *supra*, it is subject to seizure, confiscation and destruction by the municipality of the City of Chicago.

Yours respectfully,

M. W. CAGNEY,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 1, 1913.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

You today verbally requested an opinion as to whether the General Assembly of the State of Illinois could by amendment of the Mueller Law or otherwise, give to cities, or more particularly, the City of Chicago, the power to mortgage or pledge for the benefit of holders of street railway certificates the right to use the contemplated passenger subways for a period of not to exceed twenty years after a sale under a foreclosure of such a mortgage.

The Mueller Law, Section 2, provides that:

"In order to secure the payment of any such street

railway certificates and the interest thereon, the city may convey, by way of mortgage or deed of trust, any or all of the street railway property acquired or to be acquired through the issue thereof * * * Any such mortgage or deed of trust may carry the grant of a privilege or right to maintain and operate the street railway property covered thereby, for a period not exceeding twenty (20) years from and after the date such property may come into the possession of any person or corporation as the result of foreclosure proceedings. * * *

On January 18, 1906, an ordinance was passed by the City Council of the City of Chicago which, as supplemented by an ordinance passed May 28, 1906, makes provision for the issuing of street railway certificates of the City of Chicago to the amount of \$75,000,000.00, pursuant to the provisions of the Mueller Law. Such ordinance further provided for a trust deed or mortgage to be given by the City of Chicago to secure the payment of said street railway certificates and said trust deed or mortgage contained the following provision:

“Article 5. In the event that this trust deed shall be foreclosed by reason of any of the defaults hereinbefore declared to be a cause of foreclosure, there shall be a sale of all the property, both real and personal, and rights and franchises hereby mortgaged, and then and in such event the title to all the property hereby mortgaged, both real and personal (exclusive of franchises and operating rights), shall vest in the purchaser at such foreclosure sale; and the purchaser at such foreclosure sale, in addition thereto, shall have the right to construct, maintain and operate the said street railways, property, rights and franchises hereby mortgaged, during the period of twenty years from and after the date of such sale, subject to all the requirements in the general ordinances of the City of Chicago and subject to the control and regulation of the corporate authorities of the City of Chicago, to the same extent as if said property had been obtained through direct grant, without the intervention of the foreclosure proceedings, * * *.”

In the case of *Lobdell v. City of Chicago*, 227 Ill. 218, the question of the validity of the street railway certificates authorized by said ordinance was considered by the Supreme Court of Illinois and it was held that by reason of the provision in the mortgage pledging the right to operate the street

railways for a period of twenty years after a foreclosure sale the proposed issue of \$75,000,000.00 of street railway certificates and the execution of the trust deed or mortgage to secure their payment would create an indebtedness of the City of Chicago beyond the constitutional limit provided in Section 12 of Article IX of the Illinois Constitution, to the effect that no city shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, and that the issue and sale of said certificates and the execution of said trust deed or mortgage would, therefore, be in violation of said section of the Constitution, and, therefore, illegal and unconstitutional.

We are of the opinion that in view of the present indebtedness of the City of Chicago, an amendment to the Constitution of the State of Illinois would be necessary in order to make legal an issue by the City of Chicago of street railway certificates secured by trust deed or mortgage pledging the right to operate for any period of time after a foreclosure sale, the street railway property proposed to be acquired with the proceeds of such certificates.

Yours respectfully,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 4, 1913.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

Answering the communication of your committee through H. H. Evans, Esq., dated January 21, 1913, requesting this office to prepare a draft of an ordinance requiring elevated railway structures built over streets, alleys and public places in the city, to be made water-tight, we beg to state that we

have prepared a draft of such an ordinance covering the subject and transmit the same herewith.

We call attention to the fact that in nearly all the grants to the elevated railway companies in the city, there is to be found a provision substantially as follows:

“* * * suitable and practical devices shall be permanently placed and maintained beneath all station buildings and platforms when the same are erected over any street, avenue or alley, and also at all street crossings, arranged to intercept and promptly carry off storm water and drippings from melting snow, or from any other causes whatever * * *.”

See the following ordinances:

1. Northwestern Elevated Railroad Company.
 - (a) Ordinance dated January 8, 1894, C. P. p. 1445 (provides for a main line and branches).
 - (b) Amendatory ordinance dated June 24, 1895, C. P. p. 536 (includes west side of loop).
2. Lake Street Elevated Railroad Company.
 - (a) Ordinance dated December 28, 1888, C. P. p. 710 (Canal Street to City Limits).
 - (b) Ordinance of November 24, 1890, C. P. p. 1146 (Canal Street to Crawford Avenue).
 - (c) Ordinance of November 24, 1890, C. P. p. 1154 (Market Street to Canal Street and Crawford Avenue, to the City Limits).
 - (d) Ordinance of October 1, 1894, C. P. p. 1433 (from Market Street to Wabash Avenue, which includes Lake Street side of the loop).
3. Metropolitan West Side Elevated Railroad Company.
 - (a) Ordinance of April 7, 1892, C. P. p. 2259 (provides for main line and branches).
4. South Side Elevated Railroad Company.
 - (a) Ordinance of March 26, 1888, C. P. p. 741 (main line to 37th Street).
 - (b) Amendatory ordinance of April 2, 1891, C. P. p. 1848 (37th to 63rd Street).
 - (c) Amendatory ordinance of April 7, 1892, C. P. p. 2257 (63rd Street).
 - (d) Ordinance of March 16, 1903 (Track Elevation Ordinances to December 31, 1908, p. 573).

The ordinances granting rights to the elevated companies to construct the Van Buren and Wabash avenue sides of the

loop contain no express provision on the subject of maintaining devices for carrying off rain and snow drippings.

See the following ordinances:

- (a) Ordinance to Union Consolidated Elevated Railroad Company, dated June 29, 1896, C. P. p. 579 (Van Buren Street side of the loop).
- (b) Ordinance to Union Elevated Railroad Company, dated October 14, 1895, C. P. p. 1055 (Wabash Avenue side of the loop).

In view of the fact that provision is made for the maintenance of devices to carry off drippings in almost all of the ordinances to the elevated railroad companies, we suggest that your committee take this matter up with the different companies for the purpose of advising them that they are violating the terms of the grants under which they operate and ascertaining if the companies will not voluntarily comply with their ordinance obligations in this respect.

Should the companies refuse to comply voluntarily with the demands of your committee after a reasonable time has elapsed, legal steps may then be instituted to compel compliance under the respective ordinances herein referred to or under the accompanying ordinance.

The proposed ordinance transmitted herewith, will apply to all elevated railway structures and to all the elevated structures of steam railroads at street intersections.

The ordinance does not require devices to be maintained under all elevated structures, built over the *streets, alleys* and *public places* in the city. At the suggestion of the chairman of your committee, we have confined the operation of the ordinance to street intersections *only*.

We have made no provision in the proposed ordinance relating to drippings over paths and passageways on private property en route to stations, for the reason that we believe such provision would be of questionable validity.

The private property herein referred to, we assume is the private property of the company. Such property is part of the right of way of the company.

In *St. Louis K. C. & C. R. Co. v. Wabash Railroad Company*, 152 Fed. Rep., page 849, the words "right of way" were defined as follows:

“The ordinary signification of the term ‘right of way’ when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes, is the entire strip or tract it owns or is entitled to use for this purpose, and not any specific or limited part thereof upon which its main track or other specified improvements are located.”

It is our opinion that an ordinance requiring the elevated railroad companies to make water tight those parts of their structures over their right of way, might be construed as an attempt to regulate the use of the private property of the company, in which case it would be invalid.

Respectfully submitted,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 4, 1913.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

Answering the communication of your committee through H. H. Evans, Esq., dated January 21, 1913, requesting this office to prepare a draft of an ordinance requiring elevated railway structures built over streets, alleys and public places in the city, to be made water-tight, we beg to state that we have prepared a draft of such an ordinance covering the subject and transmit the same herewith.

We call attention to the fact that in nearly all the grants to the elevated railway companies in the city, there is to be found a provision substantially as follows:

“* * * suitable and practical devices shall be permanently placed and maintained beneath all station buildings and platforms when the same are erected over any street, avenue or alley, and also at all street crossings, arranged to intercept and promptly carry off storm water and drippings from melting snow, or from any other causes whatever * * *”

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 - (c) Ordinance of November 24, 1890, C. P. p. 1154 (Market Street to Canal Street and Crawford Avenue, to the City Limits).
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3. Metropolitan West Side Elevated Railroad Company.
 - (a) Ordinance of April 7, 1892, C. P. p. 2259 (provides for main line and branches).
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 - (a) Ordinance of March 26, 1888, C. P. p. 741 (main line to 37th Street).
 - (b) Amendatory ordinance of April 2, 1891, C. P. p. 1848 (37th to 63rd Street).
 - (c) Amendatory ordinance of April 7, 1892, C. P. p. 2257 (63rd Street).
 - (d) Ordinance of March 16, 1903 (Track Elevation Ordinances to December 31, 1908, p. 573).

The ordinances granting rights to the elevated companies to construct the Van Buren and Wabash avenue sides of the loop contain no express provision on the subject of maintaining devices for carrying off rain and snow drippings.

See the following ordinances:

- (a) Ordinance to Union Consolidated Elevated Railroad Company, dated June 29, 1896, C. P. p. 579 (Van Buren Street side of the loop).
- (b) Ordinance to Union Elevated Railroad Company, dated October 14, 1895, C. P. p. 1055 (Wabash Avenue side of the loop).

In view of the fact that provision is made for the maintenance of devices to carry off drippings in almost all of the ordinances to the elevated railroad companies, we suggest that your committee take this matter up with the different com-

panies for the purpose of advising them that they are violating the terms of the grants under which they operate and ascertaining if the companies will not voluntarily comply with their ordinance obligations in this respect.

Should the companies refuse to comply voluntarily with the demands of your committee after a reasonable time has elapsed, legal steps may then be instituted to compel compliance under the respective ordinances herein referred to or under the accompanying ordinance.

The proposed ordinance transmitted herewith, will apply to all elevated railway structures and to all the elevated structures of steam railroads at street intersections.

The ordinance does not require devices to be maintained under all elevated structures, built over the *streets, alleys* and *public places* in the city. At the suggestion of the chairman of your committee, we have confined the operation of the ordinance to street intersections *only*.

We have made no provision in the proposed ordinance relating to drippings over paths and passageways on private property enroute to stations, for the reason that we believe such provision would be of questionable validity.

The private property herein referred to, we assume, is the private property of the company. Such property is part of the right of way of the company.

In *St. Louis K. C. & C. R. Co. v. Wabash Railroad Company*, 152 Fed. Rep., page 849, the words "right of way" were defined as follows:

"The ordinary signification of the term 'right of way' when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes, is the entire strip or tract it owns or is entitled to use for this purpose, and not any specific or limited part thereof upon which its main track or other specified improvements are located."

It is our opinion that an ordinance requiring the elevated railroad companies to make water tight those parts of their structures over their own right of way, might be con-

strued as an attempt to regulate the use of the private property of the company, in which case it would be invalid.

Respectfully submitted,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 4, 1913.

HON. JOHN MCWEENY, General Superintendent of Police.

Dear Sir:

Replying to your inquiry of January 30th, we beg to advise you that if a train belonging to the C. R. I. & P. R. R. Co. would obstruct a crossing for four minutes, and before it had passed the crossing, a train of the B. & O. R. R. Co., running on another track would hold the same crossing three minutes longer, and before that had passed, a train belonging to the Monon on still another track would obstruct the same crossing for two additional minutes, none of these companies would be violating Section 2185 of the present Code, notwithstanding the fact that the crossing had been held nine minutes, whereas, the limitation fixed by the Code is five minutes, by reason of the fact that none of the railroads mentioned, by itself, held the crossing to exceed five minutes.

Answering your second question, we beg to advise you that we believe that it is a violation of Section 2185 for a railroad company to hold a crossing to exceed five minutes, irrespective of the fact whether in doing so the train is stationary or moving.

Yours very truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 5, 1913.

HON. CHARLES M. THOMSON, Alderman, 25th Ward.

Dear Sir:

Your communication of the 1st inst., *in re* power of City Council to require frontage consents for the location of coal yards in residence districts, has been referred to me for reply.

Hurd's Revised Statutes of 1911, Ch. 24, Art. V, Sec. 1, Par. 93, gives the City Council power,

"To regulate and prohibit the keeping of any lumber or coal yard and the placing or piling or selling any lumber, timber, wood, coal or other combustible material, within the fire limits of the city."

An ordinance requiring frontage consents to erect slaughter houses was upheld in *Harminson v. City of Lewistown*, 153 Ill. 313.

Livery stables:

City of Chicago v. Stratten et al., 162 Ill. 494.

Gas tanks:

Standard Oil Co. v. City of Danville, 109 Ill. 50.

Wooden buildings within fire limits:

Patterson v. Johnson, 214 Ill. 481-488.

I am, therefore, of the opinion that the City Council has the power to pass an ordinance requiring frontage consents as a condition precedent to the location of coal yards in residence districts within the fire limits of the city.

I call your attention to Section 662 of the Chicago Code of 1911 containing provision requiring frontage consents for the erection of open shelter sheds used for the storage or handling of coal, brick, etc., within seventy-five feet of any building used exclusively for residence purposes, unless the consent of the owners of the majority of the frontage on both sides of such street between the two nearest intersecting cross streets shall first have been obtained.

Yours very truly,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 6, 1913.

TO THE HONORABLE, THE CITY COUNCIL, of the City of Chicago.

Gentlemen:

In the above entitled matter the present situation is such that we deem it right to report fully to your Honorable Body what has been done, and to ask for instructions, before proceeding further.

For some years past the city has been trying to induce or compel the Chicago & Oak Park Elevated Railroad Company to elevate its tracks through Austin. In 1906 and 1909 ordinances were passed requiring the elevation of these tracks, but in each case the ordinance contained the usual clause providing that it should take effect only on its acceptance by the company and should be void if not accepted by the company within a specified time. In each case the company refused or omitted to accept.

On November 22, 1909, the city passed an ordinance which, in substance, required the company to take its tracks off South Boulevard, being the street on which the tracks are laid through Austin. In the case of *Chicago v. Oak Park Elevated Railroad Company*, 250 Ill. 486, the Supreme Court of Illinois held this ordinance to be void on grounds stated in the opinion. But the court expressly pointed out that this was not a track elevation ordinance, and guarded itself against being understood to imply that the city had not the power to compel this company to elevate its tracks.

The Supreme Court has, in several cases, decided that a city has the power, by a general ordinance, to compel the elevation of all railroad tracks similarly situated within the city limits, where the general conditions are such as to call for track elevation. But the court has not yet decided that the city can select one particular road and compel it to elevate, while leaving on the surface other roads in respect to which the conditions equally call for elevation.

To meet this difficulty this department prepared a mandatory elevation ordinance, creating a class consisting of all railroads having their tracks parallel to, and within fifty feet of, an elevated structure used by another railroad, where

there were subways under such elevated structure of the other railroad. The ordinance, which was passed by the Council on November 13, 1911, commands all roads coming within this class to commence the work of elevation within ninety days after the passage of the ordinance, and to complete said work before December 31, 1913. The ordinance expressly excepts "such railroads as are commonly known as street car lines." The Chicago & Oak Park Elevated Railroad Company comes within the class subject to the provisions of this ordinance. It has treated this ordinance as it has treated previous ones. It has completely ignored the ordinance and taken no steps towards elevation.

The position of the company has been that it did not have, and could not raise, the money necessary for elevation. On November 13, 1911 (the day the ordinance was passed), Samuel Insull was appointed receiver of the company by the Federal Court at Chicago on a bill by The Central Trust Company of New York, a judgment creditor. About a month ago, the writer conferred with Mr. Budd, the receiver's manager, and Mr. Porter of Isham, Lincoln & Beale, the receiver's attorneys. Mr. Porter stated that shortly after his appointment, the receiver had applied to the court for leave to issue receiver's certificates to raise funds necessary for elevation; that leave had been granted; but that the receiver, after every effort, had been unable to float the certificates; that the court could not compel the company to elevate when the company did not have and could not obtain the necessary money.

So far as we have been able to ascertain, neither the people of Austin nor of Oak Park want the transportation done away with. But it seems to be the belief of the Austin people that, if the company had to elevate or quit, it could and would find some way of raising the necessary money. In the case of *People ex rel. Golden v. The Mayor and Council of Chicago, et al.*, being General No. 308582 in the Circuit Court of Cook County, the relator Golden, a resident and tax-payer of Austin, asks for a mandamus directing the city to proceed forcibly to remove the tracks and other obstructions made by said company from the surface of South Boulevard in Austin.

This case is pending on general demurrer to the petition. It was recently reached on first call, and set for trial.

The Commissioner of Track Elevation and the Commissioner of Public Works lately requested this office to take the necessary steps to enforce the ordinance of November 13, 1911.

There are five ways in which the city might take action with a view to enforcing this ordinance.

1. The City Council might pass an ordinance reciting the ordinance now sought to be enforced, reciting that the Chicago & Oak Park road came within the class specified in that ordinance, and that the company had failed to comply with the ordinance; and then directing the proper officer to serve notice on the company and the receiver that unless steps were taken to start work in compliance with the ordinance within a number of days, to be specified in the notice, the city would proceed to remove the rails of the company from the streets; and further directing the proper officers so to remove the rails by force, in case of non-compliance with the notice.

If this course were pursued, it would almost certainly lead to an application to the Federal Court by the company, or by the creditor who is complainant in that court, asking for an injunction or restraining order; and this would probably lead to the question being litigated in the Federal Court instead of in the State Court.

In case they did not apply for such an injunction, then the city would have to decide whether it would carry out its threat and forcibly remove the rails. For reasons unnecessary to state, but some of which are referred to below, we do not think that this course would be a safe course for the city to pursue.

2. The city might proceed to enforce the penalty prescribed by the ordinance. It would be necessary to obtain leave of the Federal Court, before naming the receiver as defendant in such a proceeding. This leave would almost certainly be refused; but even if it were granted, it is not very easy to see how payment of the fine could be enforced. It could not, of course, be enforced by execution, pending the Federal receivership, and would have to be enforced, if at all,

through an order of the Federal Court directing the receiver to pay it out of the funds in his hands.

3. The city might proceed in the State Court for mandamus, directing the company or the receiver to obey the ordinance. It would be necessary to obtain leave of the Federal Court, before making the receiver a defendant in this proceeding.

4. The city might proceed in the State Court, or in the Federal Court, in *quo warranto* to forfeit the charter of the company as a corporation and also to forfeit the franchise or license granted by the Town of Cicero, under which the company was, and the receiver is, operating on the streets in question. Before the Federal receiver could be made defendant in such a proceeding in the State Court it would be necessary to obtain the leave of the Federal Court.

5. The city might file an intervening petition in the suit pending in the Federal Court, setting out the grounds upon which it claims that the company has forfeited its franchise to be a corporation and its special franchise to use the streets, and asking the court to direct its receiver to either elevate the tracks or to cease to operate in the streets.

We shall not attempt to discuss at length in this report the legal grounds upon which we have reached the conclusion that the fourth of the methods of procedure above suggested would be the most likely to lead to the desired result.

Suffice it to say:

(1) This was the course pursued in the telephone company case (*People v. Chicago Telephone Company*, 220 Ill. 238) with entirely satisfactory results.

(2) It has been repeatedly decided by the Supreme Court of Illinois that, when it is desired to raise the questions whether a public service corporation has done acts which subject it to a forfeiture of its general franchise to be a corporation or of its special franchise or license to use the streets, such questions can only be raised by the people in a direct proceeding in *quo warranto*.

(3) The previous case in 250 Ill., above referred to, might be held to be *res judicata* as against the city on the question of whether the ordinance granted by the Town of

Cicero still constitutes a valid contract, but could not be held to be *res judicata* on the question as against the people.

(4) As regards the first of the methods above stated, it must be remembered that, even if the company has done acts which render it liable to forfeiture of its general and special franchises (and we are of the opinion that it certainly has done such acts), that does not render these franchises liable to collateral attack. Until they are forfeited in a direct proceeding by the people, they are still valid as against other parties. We entertain no doubt but that, if the city were to attempt to forcibly remove the tracks from the street before the franchise has been forfeited in a *quo warranto* proceeding to which the receiver was a defendant, it would by so doing place itself in contempt of the Federal Court.

Having reached the conclusion that the best method of procedure was that by way of *quo warranto*, we prepared an information in *quo warranto* in the State Court against the company and the receiver. We obtained the signature of the state's attorney to this information and to the petition for leave to file same, and his authority to proceed in the name of the people.

Before filing this information in the State Court, for reasons hereinafter suggested, we deemed it expedient to obtain the leave of the Federal Court to name the receiver as a party defendant to such information in the State Court. Notice was accordingly served upon the solicitors for the parties to the suit in the Federal Court in which the receiver was appointed, and the application was heard by Judge Kohl-saat on Monday, January 13, 1913.

The judge held clearly and decisively that leave to sue the receiver in such a proceeding was necessary, and that to have named the receiver a defendant in such a proceeding in a State Court, without having obtained the leave of the Federal Court, would have clearly put the party so doing in contempt of court.

The Federal statute provides that a receiver appointed by a Federal Court may be sued without leave of court in respect of anything done during the receivership. The judge held that this did not apply to a proceeding which attacked

the title of the receiver to possess the property of which the court had put him in possession. We think the judge is right as to this.

He refused leave to name the receiver as a defendant in the *quo warranto* proceeding in the State Court. He said that on a question which directly affected the title of the receiver to the property in possession of which he had been put by the court, he would not be bound by the decision of the State Court, in any event, but would insist upon the right of his court to decide that question for itself.

He intimated the whole matter might be decided by the city asking leave to intervene in the creditor's suit in which the receiver has been appointed, and setting forth in its intervening petition the grounds on which it contended that the corporation had forfeited or lost its title to the franchises and property now possessed and operated by the receiver.

We objected to this mode of procedure on the ground that it would deprive us of important advantages which we would have in a proceeding brought in the name of the people. After considerable discussion he intimated that he might possibly be willing to give us leave to file an independent information in *quo warranto* in the Federal Court against the receiver, but said it would be time enough to decide that matter when we applied for leave.

Having been so refused leave to name the receiver as a party defendant in the State Court, and being very decidedly of the opinion that the people of the State of Illinois ought to be accorded the right to litigate somewhere, and in some court, in a direct proceeding by *quo warranto*, the question whether the receiver was usurping, without due authority, the right to run trains of cars over certain streets of the City of Chicago, we then prepared two separate informations in *quo warranto*, one to be filed in the Federal Court and the other in the State Court. The first named the receiver alone as the defendant and charged that he was usurping the right to run certain trains of cars over certain streets in the City of Chicago; and the other named the company only as defendant and charged that it was usurping both the general franchise to be a corporation and the special franchise to use

the streets. Notices were duly served of an application before Judge Kohlsaas for leave to file the information in the Federal Court, and of an application before Judge Baldwin for leave to file the information against the company in the Circuit Court of Cook County.

The application for leave to file the petition in the Federal Court was heard by Judge Kohlsaas on January 29, 1913. Mr. Porter of Isham, Lincoln & Beale for the receiver, and Mr. Fyffe for the company, opposed the motion. The judge refused leave to file the information upon the ground stated below.

The application was resisted upon the following grounds:

(1) That the mode of procedure was not the right mode; that the proper mode would be either (a) by intervening petition by the city in the suit in the Federal Court in which the receiver had been appointed, asking that the receiver be directed to either elevate the tracks or to take the tracks off the streets, stating the grounds for the request; or (b) by mandamus in the State Court against the company asking that it be ordered to elevate the tracks in obedience to the ordinance; or (c) by proceeding in the State Court against the company to enforce the fines provided by the ordinance in the event of failure by the company to commence the work of elevation within ninety days after the passing of the ordinance;

(2) That the elevation ordinance gave the company until the last day of 1913 to complete the work of elevation, and that no such drastic action as asked for in this proceeding ought to be taken unless and until the company had failed to do the work within the limited time;

(3) That it did not appear that the City Council or the local transportation committee had authorized or directed the Corporation Counsel to take such action as now proposed by him.

In urging the last objection Mr. Porter stated the company's representatives had been before the local transportation committee several times during the past few weeks arranging to make improvements in the service and to take additional precautions against accidents in accordance with the

suggestions of the committee, and that nothing had been said or intimated to them of any intention to institute any such proceedings against the company or its receiver.

Judge Kohlsaas refused the application on the second ground of objection stated above. While admitting the ordinance provided the company should commence work within ninety days after the passage of the ordinance, and that this had not been done, he said he would not be prepared to apply any such drastic remedy as asked for in the pending motion or to enter a judgment of ouster against the company, until the time given to complete the work had expired and, therefore, he saw no reason to give leave to file the information.

Although he did not expressly state, his remarks implied that if track elevation was not begun before the end of this year, he would then be in a more favorable mood to entertain such an application. He expressly stated that he considered the case of the city against the company on the issue of the need of track elevation in the interests of public safety to be extremely strong.

On the question of procedure, he decided nothing expressly either way, but the implication was he considered the procedure adopted to be all right. From the discussion as to possible methods of procedure we are more thoroughly convinced that the method we have adopted is the best method, and that, if we can effect nothing in this way, we certainly can effect nothing in either of the other two ways suggested before Judge Kohlsaas. To proceed to either mandamus the company in the State Court or to fine the company in the State Court would under the present conditions be a waste of time, and of the money expended in docket fees.

Judge Kohlsaas declined to hold that he would regard *quo warranto* proceedings against the company alone in the State Court as a contempt of his court, as being an indirect attack upon the title of the receiver as claimed by the receiver's attorney.

The receiver's attorney intimated that, if leave to file *quo warranto* proceedings against the company alone were granted by the State Court, he would ask the Federal Court to restrain the trial thereof. We do not think he would be

able to get such an order; but believe he would be able to get an order removing such proceedings to the Federal Court, thereby obtaining substantially the same result.

In these circumstances, we respectfully ask the instructions of your Honorable Body. The motion for leave to file *quo warranto* proceedings against the company alone in the State Court stands over generally awaiting your directions.

By denying leave to proceed against its receiver the Federal Court has assumed the responsibility for maintaining until the end of this year the exceptionally dangerous conditions which unquestionably exist on this railroad. The attorneys for the company and the receiver say that before the expiration of this year the road will have been sold and the money to elevate will have been obtained. The Federal Court judge intimates, but does not expressly say, that, if the work of elevation has not been begun before the end of this year, he will then entertain favorably an application for leave to file in his court an information in *quo warranto* against the receiver, assuming that the receiver shall not have been previously discharged.

For reasons above in part suggested, we do not believe that, by pressing the motion before Judge Baldwin or by other means, we could reasonably hope to force action before the close of the present year. It must also be borne in mind that, if the facts regarding the money situation be as the company and the receiver claim, the most we could hope to accomplish, for the present at least, would be to do away with the transportation in Austin; which, of course, would also cut off the people in Oak Park, so far as this mode of transportation is concerned.

Awaiting your further instructions, we are,

Yours respectfully,

WILLIAM DILLON,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 7, 1913.

HON. RAY PALMER, Chairman, Board of Examiners of Moving
Picture Operators.

Dear Sir:

Your letter of January 30th requesting an opinion in re legality of a requirement by your Board that applicants for a moving picture operator's license be required to be conversant with the English language, has been referred to me for reply.

Section 1613, as amended February 5, 1912, of the Chicago Code of 1911, provides that:

"It shall be the duty of the board of examiners of moving picture operators to examine all applicants for licenses as moving picture operators in regard to their qualifications to operate moving picture machines and devices and also to pass on the qualifications of all applicants for permits to act as apprentices to licensed moving picture operators. The said board shall have the power to adopt such reasonable rules and regulations as to the time and manner of conducting examinations and the requirements thereof as will enable it to ascertain fully the competency, the record for efficiency and the fitness of each applicant. * * * Each operator shall notify the board promptly on transferring from one place of employment to another."

The above ordinance was passed by the City Council under the powers given it by Clauses 41, 58, 66 and 98 of Section 1, Article V, Chapter 24, Hurd's Revised Statutes of 1911. Clause 41 gives the city power

"To license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals, and other exhibitions, shows and amusements, and to revoke such license at pleasure."

Clause 58 gives the city power

"To regulate places of amusement."

See *Block v. City of Chicago*, 239 Ill. 251.

By the sections of the ordinance above quoted, your Board is given the power to adopt such reasonable rules and regulations as to the requirements of examinations, as will enable it to ascertain fully the competency and *fitness* of each applicant. Such examination of moving picture operators is

unquestionably required for the purpose of protecting the health and life of the public.

I am of the opinion that it is reasonable to require operators not only to understand the mechanical operation of moving picture machines, but also to be competent to operate the same under any and all conditions. While the ability to be conversant with the English language may not affect the capacity of an operator to perform the mechanical service necessary, yet his inability so to be may undoubtedly handicap him in the event of an emergency, such as a fire or panic.

Whether such a rule would be in contravention of the rights, privileges and immunities given all persons by the Constitution of the United States, must, however, be considered. As it is not the intention of your Board to distinguish between foreign born and American applicants, but simply to require all applicants to be conversant with the English language, I see no unjust discrimination or restraint directed against any class of persons by such rule.

I am, therefore, of the opinion that the rule of your Board requiring moving picture operators to be conversant with the English language may properly be enforced.

Respectfully submitted,

LORING H. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 7, 1913.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

The Corporation Counsel has received a communication from Mr. John P. Wilson, attorney for the lessee of the so-called "Rookery" lots, stating that he desires that certain negotiations pending between his client and the city may be brought to a conclusion and, as Mr. Wilson is about to leave the city for a prolonged absence, we place the whole matter before your committee in order that you may, if you see fit,

take up the negotiations with Mr. Wilson before his departure.

In order that the negotiations hereinabove referred to may be more fully understood, I will add a resume of the transactions heretofore had in this matter.

On June 2, 1852, the land upon which the Rookery Building has since been constructed was purchased by the Board of Water Commissioners of the City of Chicago for the purpose of being used in connection with the water system of the city and was used originally as reservoirs. After the fire of '71 it was used for the purpose of Court House, City Hall and other public purposes until the year 1884. It is now and has always been held either by the Board of Water Commissioners or the City of Chicago, as trustee, for the use of the water fund.

On February 26, 1885, pursuant to the passage of Council order, this land was advertised for lease. The Council, by ordinance of May 12, 1885, accepted the proposal of E. C. Waller and directed the execution of a lease, which was done and provided for a demise of the property for ninety-nine years at an annual rental of \$35,000 commencing May 1, 1886. The lease contains a stipulation that the lessee shall not be obliged to pay any taxes of any kind levied or assessed against the property, which is contained in the following provision:

"It is expressly understood, covenanted and agreed by and between the parties hereto, for themselves and their respective heirs, executors, administrators, successors and assigns, that all the said lands and lots being exempt from taxation, the party of the second part, his heirs, executors, administrators or assigns, shall not be obliged or compelled to pay any taxes of any kind, sort or description whatsoever (except special assessments) levied, laid, assessed or imposed upon the land, but only such taxes and water-rates, and assessments as may from time to time be levied, imposed or assessed upon the buildings or improvements to be erected upon said premises, and special assessments upon the land as hereinbefore set forth."

It was the understanding and belief of the parties to the contract at the time of its execution and prior thereto that the property was free from taxation and that the sum stipu-

lated as rental would be a net payment to the city by the lessee of \$35,000. The first taxes were assessed against the city upon this land for the year 1903 and amounted to the sum of \$20,836.60. Since that year, because of the increase in realty valuations, the taxes have advanced considerably. A statement furnished by the Comptroller shows that the taxes for 1912 amounted to \$18,186.68 and that the total amount of back taxes now due is \$258,890.86.

Of the amount due for 1912 an analysis shows the following:

State	\$1,570.67
County	2,149.34
South Park	1,570.67
City	5,125.33
School	5,745.33
Sanitary	2,025.34

Total\$18,186.68

(Book 256, p. 45 Records.)

Certain amounts of the total arrearages for taxes have been reduced to judgment (\$186,595.14) which have not been paid and against which the city has a counter claim for the amounts expended for feeding county prisoners at the House of Correction. A bill in equity has been filed by the city to set aside, cancel and annul this lease on the ground that the city as trustee of the water fund for the benefit of the people has committed a mistake in entering into the lease. As a result of this litigation offers of a compromise have been tendered by the lessee in the form of two alternative propositions:

(a) The lessee to purchase the fee in the land for \$850,000;

(b) The lessee to pay all taxes except the city and school taxes.

It is with reference to these propositions that Mr. Wilson desires your committee to take some action. In the event of the acceptance of the latter proposition, the entire rent would be paid into the city treasury and a portion equivalent to the

tax for schools would be placed to the credit of the school fund and deducted from the water fund.

May I ask your committee to advise Mr. Wilson of the date of the hearing upon this matter and to also notify the Corporation Counsel of such date.

Yours very respectfully,

JOHN W. BECKWITH,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 8, 1913.

HON. JAMES DONAHOE, Chairman, Judiciary, State Legislation, Elections and Rules.

Dear Sir:

There has been referred to this department by the city clerk a resolution presented to your committee on January 17, 1913, by Alderman Theodore K. Long, directing your committee to prepare a bill merging the Sanitary District of Chicago with the City of Chicago and we are advised by the City Clerk that your committee desire to be informed whether such a bill would be constitutional.

Section 22, Article IV of the present Constitution of the state provides that—

“The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: for— * * *

Incorporating cities, towns or villages, or changing or amending the charter of any town, city or village:

Granting to any incorporation, association or individual any special or exclusive privilege, immunity or franchise whatever.”

(Hurd's Revised Statutes of Illinois of 1911, p. LVIII.)

This section of the Constitution has been the subject of judicial decision since its adoption and in the case of *Devine v. Board of Commissioners*, 84 Ill. 590, the question arose as to whether an Act of the Legislature authorizing commissioners of counties, containing over 100,000 inhabitants, to issue

bonds for erection of a Court House or other necessary public buildings was constitutional. The court held that the act in question was a local or special law applicable only to Cook County and consequently prohibited by the Constitution.

In *People ex rel. v. Meech*, 101 Ill. 200, a statute providing that each county in the state should constitute a justice's district excepting Cook County was attacked as offending the constitutional restriction. In speaking of the motives of the framers of the Constitution and the intention disclosed by that law, it is said at page 204:

"There seems to be no doubt that those who gave us that instrument had in their minds, and fully appreciated, the great wrongs, oppression, and almost disastrous results of special legislation that had obtained under the constitution of 1848, and the fact that such legislation conferred special privileges and exemptions on the few of the injury to the many, which was totally opposed to the principles upon which our institutions are based. They determined to effectually cut off such pernicious legislation by this provision."

In *People ex rel. v. Cooper, et al.*, 83 Ill. 585, the constitutionality of the "City Tax Act" was raised on the ground that the Act was repugnant to Section 22 of Article IV of the Constitution prohibiting the General Assembly from passing any local or special law incorporating cities, towns or villages, or changing or amending the charter of any town, city or village. The court said, at page 589:

"It is obvious that the prohibition of the enactment of 'local or special laws' for these purposes, is equivalent to a command that general laws alone shall be enacted therefor; for the words 'local' or 'special' are clearly used in contradistinction to the word 'general,' and there being no power to enact 'local or special' laws, there can be no other than 'general' laws enacted. It will be observed, too, that no distinction is made between 'incorporating' and 'changing and amending charters'—whether the one or the other or both shall be sought to be done, it can not be by a 'local or special law,' and must, therefore, be by a 'general law.'

'General laws' are said to be 'those which relate to or bind all within the jurisdiction of the law making power, limited as that power may be in its territorial operation or by constitutional restraint.' Sedgwick on

Stat. and Const. Law, p. 30. The number of persons upon whom the law shall have any direct effect, may be very few by reason of the subject to which it relates but it must operate equally and uniformly upon all brought within the relations and circumstances for which it provides. *People ex rel. v. Wright*, 70 Ill. 398.

The evil supposed to exist which led to the adoption of the clause of the constitution under consideration, was dissimilarity in the provisions of charters of different cities, towns and villages and while it was not designed, by the mere act of adopting the constitution, to repeal the provisions of existing charters any further than they were in conflict with other provisions of the constitution which became operative without the aid of legislation, it was designed that no city, town or village should thereafter become incorporated, or have its charter changed or amended, except by virtue of a general law. This, we think, is manifest, both from the proceedings of the convention which framed the constitution, and the peculiar language of the constitution itself.

If no city, no town or no village can become incorporated or have its charter changed or amended, save by virtue of the provisions of a general law, operating 'equally and uniformly upon all brought within the relations and circumstances for which it provided.' It follows that all cities, all towns or all villages becoming incorporated, and all cities, all towns or all villages having their charters changed or amended, must, to the extent of such change or amendment, be brought under the same law. It is not admissible, either by the letter or the spirit of the constitution, that dissimilarity in character of organization or powers, in municipalities of the same class or grade, shall be created or perpetuated by enactments of the General Assembly."

In view of these authorities we entertain no doubt that an Act merging the Sanitary District of Chicago with the City of Chicago would be special or local legislation amending the charter of the City of Chicago and granting to a municipal corporation special privileges. Without mentioning in detail instances of the enlargement of the city's charter powers, which would result, I may refer to the provisions of Section 369j of an act relating to the Sanitary District of Chicago (Hurd's Rev. Stat. Ill. 1911, p. 362), which gives the district the power to furnish electrical energy to cities, villages and

towns within the district or adjacent to the main channel of said district.

The proposed bill would also grant to the municipal corporation of Chicago privileges not enjoyed by other cities in the state and thereby would be in conflict with the constitutional requirement.

While it is true that Section 34 of Article IV of the Constitution provides that the General Assembly—

“Shall have power, subject to the conditions and limitations hereinafter contained to pass any law (local, special or general) providing a scheme or charter of local municipal government for the territory now or hereafter embraced within the limits of the City of Chicago. The law or laws so passed may provide for consolidating (in whole or in part) in the municipal government of the City of Chicago, the powers now vested in the city, board of education, township, park and *other local governments* and authorities having jurisdiction confined to or within said territory, or any part thereof,”

yet the present Sanitary District as authorized by the act hereinabove referred to, includes large portions of territory outside of the city limits and consequently the constitutional amendment is not applicable to the situation under discussion.

Section 369e of this act embraces large tracts of land north of the city limits and including the municipalities of Evanston, Wilmette, Kenilworth and Winnetka and certain territory outside the city limits on the south and west.

Thus the territory proposed to be merged with the City of Chicago is clearly not now embraced within the limits of the city.

In conclusion, we are of the opinion that the proposed bill merging the Sanitary District of Chicago with the City of Chicago would be unconstitutional.

Yours respectfully,

(Signed) JOHN W. BECKWITH,
First Asst. Corporation Counsel.

Approved:

(Signed) WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 8, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

We have noted the contents of the communication to you from the Hyde Park Protective Association by Church and McCurdy, its attorneys, under date of January 29th, requesting that you give an order to the City Collector directing that no new saloon licenses shall issue in the territory bounded by 54th street, 56th street, Jefferson avenue and the Illinois Central Railroad.

The communication states that the territory in question is local option territory under the Hyde Park ordinance and that there are now several saloons therein. It then expresses the opinion that as a matter of law the Mayor of the City of Chicago is vested with the discretion to refuse to grant any more licenses in this territory if, in his opinion, the existing saloons are as many as he may "deem proper" for said territory.

We cannot agree with the conclusion of the association's attorneys on the legal question involved. It is true, as stated in the communication, that Section 6 of the Hyde Park ordinance relating to dramshops (which still remains in force in that territory) provides that —

"The president and board of trustees, by resolution, may grant licenses to keep so many dram shops or saloons in the village of Hyde Park, outside of prohibited districts, as they may deem proper; * * *"

and that section 7 of said ordinance provides that—

"The president of the board of trustees is authorized to issue licenses according to the resolution provided in section six, and such licenses shall be signed by him and attested by the hand of village clerk, and be under the corporate seal of the village. * * *"

In the Cregier case, the Supreme Court discussed the above mentioned ordinance by Hyde Park and after stating (p. 420) that such ordinance—

"was not mandatory in respect to issuing licenses outside of prohibited districts, but merely authorized the village authorities to grant licenses to keep as many

dram-shops in those portions of the village as they might think the public good required,"

the court proceeds to say (p. 421) :

"We would not be understood as holding that a board of trustees may, by resolution merely, license one, and refuse to license another having precisely the same qualifications and local surroundings, our view being, that an ordinance must, in advance of the issuing of any license, prescribe the terms and conditions upon which licenses shall be granted, so that all in like situation, with like surroundings and having like qualifications, shall have equal opportunity to avail themselves of its privileges, and that it is not admissible for a city council or board of trustees to retain power to license one and refuse to license another, through mere caprice or favoritism."

In the recent case of *People v. Harrison*, 256 Ill. 102, where the court was considering the question of the validity of certain provisions of the Harkin ordinance, the court said (p. 107) :

"The power to license, regulate and prohibit can be exercised only through an ordinance of the city, and such ordinance must be a general one, specifying the manner and conditions of the issue of the license, the power conferred by it, and uniform in its operation upon persons within its scope."

It is apparent from the foregoing that it is not the view of the Supreme Court that the licensing authorities should exercise a discretion in respect to granting or refusing to grant individual applications for licenses depending on whether as many licenses had been granted for a given locality as they should "deem proper." On the contrary, the holding of the court is that the discretion vested in the licensing authorities should be exercised in the form of an ordinance describing the terms and conditions upon which licenses shall be granted, applicable to all alike.

The board of trustees of the Village of Hyde Park, by ordinance, created certain prohibition districts and by ordinance applicable to all other territory (including the territory in question) provided that an application for a dram-shop license—

“shall be signed by a majority of the property owners, according to frontage, on both sides of the street in the block in which such dram shop is to be kept and shall also be signed by a majority of the *bona fide* householders and persons or firms living in, or doing business on each side of the street in the block upon which such dram shop shall have its main entrance: * * *

By passing said last mentioned ordinance, the village authorities prescribed the terms and conditions upon which such licenses should be granted in territory not in prohibited districts.

In the case of *Harrison v. People*, 222 Ill. 150, the court said (p. 153):

“Of course, where an ordinance authorizes the issuing of a license to keep a dram-shop upon certain terms and conditions, the authorities authorized to grant the license cannot arbitrarily refuse the same, nor discriminate between persons, places and regulations pertaining to the business, without reasonable grounds therefor.”

The Supreme and Appellate Courts of Illinois in the cases of *Harrison v. People*, *supra*, and *Kretzmann v. Dunne*, 228 Ill. 31, and other cases, have refused to sustain or grant mandamus to compel the Mayor to issue a license to keep a saloon in close proximity to a school or religious or charitable institution or exclusively residence district. There was, however, in refusing to grant the licenses in these cases, no discrimination between persons similarly situated. The rules or regulations under which the licenses were refused applied to all applicants alike and were uniform in their operation upon all persons within their scope.

Where, as is the case in the matter under consideration, the licensing authorities have by ordinance provided for the granting of saloon licenses in certain territory upon applications signed by a certain percentage of the property owners and others in the block in which the saloon is to be kept and saloons are being kept in said territory under licenses granted under such applications, we are of the opinion that the Mayor does not have the discretionary power to refuse to grant new or additional licenses (other than the renewal of exist-

ing licenses) on the ground that as many licenses have already been granted for the given territory as he deems proper.

We return herewith the above mentioned communication from the Hyde Park Protective Association and also the communications to you from Mr. LeRoy Kramer and Mr. R. V. Fletcher, both dated January 28, 1913, in which the question hereinabove discussed is raised.

Yours very truly,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 10, 1913.

HON. THEODORE K. LONG, Chairman, Lake Shore Reclamation Commission.

Dear Sir:

Replying to your inquiry of February 7th, by telephone, to this department asking whether we have any objections to a proceeding proposed to be brought by the South Park Commissioners to condemn the riparian rights of Clara M. Jones and the Beach Hotel Company, the alleged owners of the tract of land in dispute in the North West Fractional Quarter of Section Twelve, Township Thirty-eight North, Range Fourteen, East of the Third Principal Meridian, which tract is the subject matter of a suit General Number 278,541, in the Superior Court of Cook County, Illinois, we beg to reply as follows:

The tract in question at the date of filing the above suit April 19, 1910, contained 7.91 acres. Our position in regard to the title of this tract is that it is the property of the State of Illinois and that neither Clara M. Jones, nor the Beach Hotel Company has any land in said Fractional Quarter Section bordering upon Lake Michigan.

The tract of land in dispute and which we claim belongs to the State of Illinois lies between the waters of Lake Michigan and a small triangular tract of land in the Southwest corner of said North West Fractional Quarter, which trian-

gular piece belongs to Clara M. Jones and the Beach Hotel. This disputed strip varies in width from 175 to 450 feet, and at all points lies between the said triangular tract and the waters of Lake Michigan.

The proposal of the South Park Commissioners as we understand it, is to condemn the riparian rights of Clara M. Jones and the Beach Hotel Company north and east of the present shore line without including in the condemnation any land now above the water line.

Riparian rights are intangible, incorporated rights issuing out of the substantial, tangible, corporeal property of a shore owner. Since Clara M. Jones and the Beach Hotel Company have no land nearer than one hundred seventy-five feet to the water, our position is that they have no riparian rights, hence they possess nothing which could be subject matter of a condemnation suit such as proposed by the South Park Commissioners.

We are of the opinion that according to the law, the filing of a petition in condemnation to take the riparian rights of Clara M. Jones and the Beach Hotel Company, would be an admission on the part of the South Park Commissioners that the defendants were the owners of the corporeal property (the upland) and of which such rights issue.

The law requires that in a petition for condemnation notice must be given to all parties intended to be included as owners and interested persons and the petitioner is estopped from proving that the party, alleged in his petition to be the owner, has not the title.

It has been said that when a petitioner alleges ownership in a defendant and the defendant acknowledges it by claiming damages, there is an end of any contest about title.

It is the duty of the petitioner to ascertain the title before the commencement of proceedings, or, if the title is defective to state it as it really is if it is less than a fee simple, and then the compensation will be commensurate with the character of ownership.

The party whose land is sought to be condemned is no more bound to prove title than is the South Park Commis-

sioners bound to prove its organization so as to enable it to take land.

If the petitioner does not desire the land it can dismiss its petition. If the defendants are not the owners the allegation should be so made, and it certainly would be anomalous to require them to prove an allegation made by the petitioner and which forms the basis of the proceeding.

Peoria, Pekin & Jacksonville R. R. Co. v. Laurie, 63 Ill. 264.

Our view of such a proceeding would be something like this:

That the petitioner bringing such a suit would acknowledge the defendants as owners thereby forcing them into the courts for the purpose of determining their compensation for property to be taken, and then modestly demanding that no compensation be assessed because they are not the owners.

The argument back of this position if insisted upon and carried to its logical conclusion would have the effect to dispossess the defendants and give the South Park Commissioners the land without compensation to anyone.

Peoria & R. I. Railway Co. v. Bryant, 57 Ill. 473.

It has been held in the *Sanitary District of Chicago v. Pittsburgh, Ft. Wayne & Chicago Railway Co.*, 216 Ill. 575, at page 579, as follows:

‘The averments of the petition as to the nature or extent of the estate or title of the defendants are not binding on the defendants, and upon a proper issue the court may determine such questions, but such averments are binding upon the petitioner, and the defendants are not required to establish their title. * * * *If a corporation entitled to exercise the right of eminent domain claims that it already has a right to take land, a petition for condemnation is not the proper proceeding to try that question. It was the duty of the petitioner to ascertain the title to the premises before commencing the proceeding and to name in the petition the owner of the premises, and if the title was less than a fee simple or subject to an easement it should have been stated in the petition.*’

From the foregoing we are of the opinion that the proposed suit in condemnation is entirely inconsistent with the

pending suit brought by the State for the tract of land in dispute, which at the present time is about eight acres.

In regard to your inquiry as to whether there is any objection to abandoning this suit and conceding this tract of land to Clara M. Jones and the Beach Hotel Company, we may say that this is not a matter of law but a matter of policy and a question upon which the law department is not authorized to pass. And just how far the filing of a suit in condemnation by the South Park Commissioners, which is one of the State's subordinate agencies, constituted for a special purpose, would operate as an estoppel against the State in prosecuting the reclamation suit now pending we are not prepared to determine; suffice it to say, however, that it would not strengthen our position in that suit; and we beg to call your attention that the defendants seek to avail themselves of every possible act of the subordinate agencies of the State as a defense or an estoppel.

We further call your attention to certain portions of the South Park Act approved June 11, 1912, in force July 1, 1912. A portion of the condemnation clause is as follows:

“or if, in any event, the said board of park commissioners shall elect to acquire the riparian or other rights, or the adjacent, adjoining, submerged and penetrating or other lands, or any such rights or lands, proceedings may be had to condemn the said riparian or other rights and the said adjacent, adjoining, submerged and penetrating or other lands, or any of them, according to the provisions of an Act entitled, ‘An Act to provide for the exercise of the right of eminent domain,’ approved April 10, 1872.”

From the foregoing quotation it may be claimed that inasmuch as “the riparian or other rights” are connected with “lands” disjunctively by the conjunction “or,” that it is possible to condemn such rights separately from the *corpus* out of which these rights issue. We know of no case in which our Supreme Court has passed upon this question. It seems, however, from *dicta* in the Revell case, 177 Ill. 468, and the Fahrney case, 250 Ill. 256, 272, that such rights might be condemned separately under the condemnation powers granted by the Legislature to the Lincoln Park Commissioners and the South Park Commissioners.

The said Act of June 11, 1912 also contains the following:

“§ 1-a. The fact that any individual, corporation, or other person shall be made a party defendant to any such condemnation proceeding hereby authorized, shall not establish any presumption as to the validity or the extent of the title of such defendant, but before damages shall be assessed to any such defendant, the court shall first find and adjudge the right, title and interest of such defendant in the property sought to be taken or damaged, and through such condemnation proceeding the said board of park commissioners shall acquire whatever right, title, interest or claim such defendant may have.”

Whether or not the foregoing section would negative any estoppel above referred to, we are not prepared to say. We have made a diligent search of condemnation cases passed upon by our Supreme Court and have found no case in which a provision like this has been passed upon.

We may say, however, that if it should be found in the condemnation proceeding that the defendants had no title, then the proceeding as a condemnation proceeding would fail for lack of subject matter.

Our conclusions are as follows:

1. That the question of whether the bringing of such a suit in condemnation would operate as a waiver of the State's rights in the reclamation suit now pending has not yet been passed upon by our Supreme Court, but that we are of the opinion that notwithstanding Section 1-a above quoted, it might so operate.

2. That the question of abandoning the tract in dispute, amounting to about eight acres, if such condemnation suit should operate as a waiver is a question of policy which this department is not authorized to pass upon.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 11, 1913.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

On February 6, 1913, your Honorable Body passed an order which reads as follows:

“ORDERED, That the Corporation Counsel be and he is hereby directed to submit an opinion as to whether or not the passage by the City Council on February 11, 1907, of an ordinance granting a franchise to the Chicago City Railway Company abrogated an ordinance passed by the City Council on July 6, 1896, by the terms of which ordinance the City Railway Company agreed to pave and keep in repair for a period of twenty years the roadway, from curb to curb, in Wentworth Avenue, between 22nd and 39th Streets, in consideration for the widening of the roadway of said street between 22nd and 39th streets.”

The matter has been referred to me by the Corporation Counsel for reply. The ordinance of July 6, 1896, (which is found on page 627, Council Proceedings for 1896-1897) contains the following provisions in regard to widening the roadway on Wentworth Avenue:

(Section 2, Clause 2.) “That the Chicago City Railway Company, on Wentworth Avenue, between the points mentioned, respectively, shall not back the curb and curb wall where it exists, and widen the road-bed of said street two feet on each side thereof, thereby making the road bed on Wentworth Avenue between the points mentioned, respectively, four feet wider, the same to be without expense or cost to the respective property owners on said street between the points mentioned, and without cost or expense to the City of Chicago; and if the sidewalk is disturbed and interfered with by the proposed new curb and curb wall, such sidewalk shall be readjusted or rebuilt, so as to conform to the new curb, said company being permitted to use the old material when practicable, such readjustment or rebuilding of said sidewalk to be by the Chicago City Railway Company and without cost or expense to the abutting property owners or to the City of Chicago, and all such work to be so done pursuant to and under the direction of the Commissioner of Public Works of the City of Chicago and to his satisfaction.”

(Section 2, Clause 3:) “The Chicago City Railway Company shall newly pave said Wentworth Avenue be-

tween the points mentioned, including intersections of streets, with cedar blocks upon planks, from curb to curb, and without expense or cost to the respective property owners on said Wentworth Avenue or to the City of Chicago; provided, that the sixteen feet of right-of-way shall be paved with stone or brick blocks, as heretofore, such work to be done under and pursuant to the direction of the Commissioner of Public Works of the City of Chicago and to his satisfaction.”

By Section 12, the Chicago City Railway Company agrees that it will pave and keep in repair the sixteen feet in width in the center of the street so occupied in the manner as provided by Section 2 of the ordinance of July 30, 1883, relating to street railways. It will be seen that the ordinance of July 6, 1896, provided that after the Railway Company had set back the curbs, it should “newly pave said Wentworth Avenue between the points mentioned, including the intersections of streets with cedar blocks upon planks, from curb to curb, and without expense or cost to the respective property owners on said Wentworth Avenue or to the City of Chicago.” I am of the opinion that there is nothing in this ordinance, which either expressly or impliedly required the Railway Company to maintain or keep in repair any portion of the roadway, as thus widened, except the central sixteen feet occupied by their tracks. Their duty in respect to paving the roadway was discharged once and for all when they laid the first pavement called for by the ordinance. This being the case, the question whether any duty of repair and maintenance of the railway (outside of the central sixteen feet) was or was not abrogated by the rehabilitation ordinance of February 11, 1907, does not arise.

Respectfully submitted,

EUGENE H. DUPEE,

Assistant Corporation Counsel.

Approved:

PHILIP J. McKENNA,

Attorney Board of Local Improvements.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 13, 1913.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

At a meeting of Your Honorable Body, held on January 27, 1913, the following order was passed:

“ORDERED, That the Corporation Counsel be and he is hereby directed to make an investigation and submit a report thereon to this Council at as early a date as possible, as to the legal width of West 17th street between South Robey street and South Hoyne avenue; and be it further

ORDERED, That the Commissioner of Buildings be and he is hereby directed to withhold the issuance of a permit for the erection of a building on the 66 foot strip of land lying immediately North of the South lot line on West 17th street between South Robey street and South Hoyne avenue, pending the submission of said report by the Corporation Counsel as to the legal width of said street.”
Complying therewith we have to say that,

FIRST: West 17th street between South Robey street and South Hoyne avenue is situated between the South half and the North half of Block 37 in Section 19, Township 39, North, Range 14, East of the Third Principal Meridian. The South half of Block 37 has been sub-divided and a strip of thirty-three feet, being the North thirty-three feet of said South half, has been dedicated to the city and accepted by the city as a street. The North half of said Block has never been sub-divided and the South thirty-three feet of said North half of Block 37 has never been dedicated to the city.

SECOND: While the South thirty-three feet of the North half of Block 37 has been used by the public as a public highway, the J. J. Badenoch Company claims title to said thirty-three feet under a quit-claim deed from the Chicago, Burlington and Quincy Railroad Company, dated September 24th, 1902.

THIRD: The records in the Assessor's office show that the J. J. Badenoch Company is assessed and pays taxes upon the North half of Block 37 from the North line of West 17th street as dedicated. (See plat herewith attached.)

FOURTH: The records of the Board of Local Improve-

ments show that the J. J. Badenoch Company has been assessed for paving Robey street, as owning to the North line of West 17th street, as dedicated. (See plat.)

FIFTH: The J. J. Badenoch Company has paved at its own expense part of the thirty-three foot strip North of the North line of West 17th street, as dedicated, between South Robey street and South Hoyne avenue for the purpose of a private roadway.

Since the South thirty-three feet of the North half of Block 37 has never been dedicated to the city, therefore, any claim the city might have to said strip of land would be by prescription.

Under the holding of our Supreme Court in the case of *The City of Chicago v. A., T, Galt*, 224 Ill. 421, to establish a public highway by prescription the use by the public must have been adverse, under claim of right, continuous, uninterrupted and with the knowledge of the owner of the estate, although without his consent. It must also be shown that a certain well defined line of travel has existed over the property for at least fifteen years.

In assessing the J. J. Badenoch Company for paving South Robey street as being the owners of the strip of land North of the North line of West 17th street, as dedicated, the city is estopped from claiming adverse possession of said land.

Our Supreme Court has also held in the case of the *City of Chicago v. Chicago, Rock Island & Pacific Railway Company, et al.*, 152 Ill. 561, that the rule of adverse possession does not apply to an open way in a town or village affirmatively shown to have been so made or left by the owner for his private use, though the public may also have used it without objection by him, nor where his object and purpose are manifest from the way itself or its special relation to his other premises.

The giving of a permit to the J. J. Badenoch Company to pave part of the strip of land afore-mentioned, at its own expense tends to show that the purpose of said roadway was for private use.

Since the city cannot prove any statutory or common law dedication of said thirty-three foot strip North of the

North line of West 17th street, as dedicated, we are of the opinion that the legal width of West 17th street between South Robey street and South Hoyne avenue is thirty-three feet.

Yours respectfully,

NICHOLAS MICHELS,
ALEXANDER E. ARKIN,
Assistant Corporation Counsels.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 13, 1913.

HON. H. A. ZENDER, President, Board of Examining Engineers.

Dear Sir:

Your communication of the 6th inst., *in re* citizenship of applicant for an engineer's or water tender's license, has been referred to me for reply.

The Fourteenth Amendment of the Constitution of the United States declares:

"Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

In *Barbier v. Connolly*, 113 U. S. 27, 31, the court says:

"The Fourteenth Amendment * * * undoubtedly intended * * * that no impediment should be interposed to the pursuits of *any one*, except as applied to the same pursuits by others under like circumstances."

See *Yicko v. Hopkins*, 118 U. S. 356.

I am of the opinion that in view of the constitutional provision above set out that your board must permit applicants, regardless of their nationality or citizenship, to take examinations and if such examination is passed by them, then the board must issue such applicant a certificate of qualification.

Yours respectfully,
LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 13, 1913.

HON. EDWARD COHEN, City Collector.

Dear Sir:

It appears from the license officer's report endorsed on the application for license that the place for which the license is applied for "is located within 600 feet of the Hebrew Institute which is used for educational purposes."

It also appears from the communication of Dr. J. Pedott, Superintendent of the Chicago Hebrew Institute, attached to the application, that in view of certain assurances given by the applicants the institute has no objection to the granting of the license.

Section 733 of the Chicago Code of 1911, being a part of the chapter on "Cigarettes, Cigars and Tobaccos," is as follows:

"No person or corporation shall sell, give away, barter, exchange or otherwise deal in at any place located within six hundred feet of any school house or building used for school purposes, any cigarettes, tobacco or tobacco product of any form whatsoever used in the making of cigarettes or with which cigarette papers or wrappers are sold or given away. Any person violating any of the provisions of this section shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense."

The ordinance makes unlawful the sale or giving away of cigarettes within 600 feet of any school house or building used for school purposes. The unlawfulness of the sale or giving away of cigarettes within the prescribed distance does not depend in any degree upon whether the school authorities are or are not consenting to the sales.

Assuming from the police officer's report that the proposed location is within 600 feet of a building used for school purposes, we are of the opinion that a license for the sale of cigarettes at said location can not lawfully be issued.

The above mentioned application for license and communication from Dr. J. Pedott are returned herewith.

Yours very truly,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 15, 1913.

HON. FRANK J. WILSON, Alderman, 27th Ward.

Dear Sir:

We regret very much that the press of business has prevented us from answering your communication of December 18, 1912, before this.

Our examination into the status of the property of the Sisters of the Resurrection, proposed to be annexed to the City of Chicago, discloses that said property is adjacent to the city limits of the City of Chicago and is no part of an incorporated city, village or town, and therefore, must be annexed, if at all, under Section 1 of an Act entitled,

“An Act to provide for annexing and excluding territory to and from cities, towns and villages and to unite cities, towns and villages.” Approved April 10, 1872. In force July 1, 1872, as amended by an act approved May 10, 1901. In force July 1, 1901. (See Hurd's Rev. Statutes of 1911, page 313, Section 195.)

Under said section it will be necessary to file a petition, in writing, signed by a majority of the legal voters and by a majority of the property owners of the territory proposed to be annexed, whereupon the City Council may submit to a vote of the people of the City of Chicago the question as to whether said property shall be annexed. If the question will receive a majority of all the votes cast at said election in favor thereof, the City Council may then annex the territory by ordinance.

There is no other way of annexing the territory in question except as hereinabove outlined. Provision is made in the statute for annexation by petition of the property owners, filed in the Circuit Court, and providing for a hearing upon

said petition and the entry of a decree of annexation. These provisions are found in Sections 3 to 7 of the Act hereinabove referred to. (See pages 314 to 315 Hurd's Revised Statutes of 1911, Sections 197 to 201, both inclusive) but they have been held unconstitutional and void in the following cases:

City of Galesburg v. Hawkinson et al., 75 Ill. 152.

Covington v. City of East St. Louis, 78 Ill. 548, 553.

We herewith return communication from Father Spetz, together with description of the property and a plat thereof, pursuant to your request.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 15, 1913.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

In a letter dated January 30, 1913, your committee, through Mr. H. H. Evans, transmitted to us for our approval an operating agreement and ordinances authorizing the Chicago Railways Company to extend its operation into parts of Cicero over certain tracks owned by the County Traction Company.

The ordinances authorize the Chicago Railways Company to enter into an operating agreement with the County Traction Company for the use by each of the others track on West 12th street between South 46th avenue and South 60th avenue. (The center line of 12th street between the two streets aforesaid is the dividing line between the City of Chicago and the Town of Cicero, so that the north track on 12th street is in the City of Chicago and the south track is in the Town of Cicero.) The other streets in the Town of Cicero, upon which the Chicago Railways Company are to operate cars by the terms of the proposed agreement, are: (1) South 48th avenue between 12th street and Ogden avenue; (2)

Ogden avenue between South 46th avenue and South 48th avenue; (3) 26th street between South 46th avenue and South 48th avenue and (4) West 25th street between 48th avenue to South 52nd avenue.

We have had prepared for this purpose a plat, herewith transmitted, which will facilitate a better understanding of the lines included in the operating agreement.

The consent of the City of Chicago to such operating agreement is necessary under Section 40 of the ordinance to the Chicago Railways Company, dated February 11, 1907, (C. P. 3124) which provides as follows:

“Section 40. No lease or *operating agreement* and no assignment except by way of mortgage or trust deed under the provisions and limitations of this ordinance, shall be made by the company, without the consent of the City Council of said city.”

This provision was evidently inserted as a measure of protection to the city to prevent the depletion of the city's share of net receipts by unprofitable operating agreements with other companies.

Under the foregoing provision the city may in its discretion refuse its consent to any operating agreement, for any reason whatsoever.

We understand that your committee feels that the passage of the ordinance providing for the operating agreement will benefit thousands of residents of the city who work in plants located in the Town of Cicero just outside of the city limits. The Chicago Railways Company desires the passage of the ordinance believing that such an operating agreement would be profitable in the way of additional receipts to the company, in which event it would be of financial benefit to the city as well.

While unquestionably the city would have the right to give its consent to an operating agreement of the kind under consideration, if all lines covered by said operating agreement were within the limits of the city, nevertheless a more difficult question is presented for the reason that all the lines of the County Traction Company, mentioned in said operating agreement, are outside of the limits of the city.

A similar matter has been discussed in opinions of this department heretofore. The question has arisen in cases where it was proposed to build new extensions or rehabilitate lines of railway outside of the limits of the city and to have the cost of such extensions or rehabilitations charged to the capital account of the traction companies under the ordinances of February 11, 1907. This office has held that this could not be done, on the ground that the portions of street railway, beyond the city limits, could not be purchased by the city under the terms of the grants to the companies; and that it was never intended that the receipts of the city should be depleted by the construction of extra territorial lines or the rehabilitation of such, when the city would never be in a position to purchase such lines.

The ordinance under consideration, however, does not attempt to do this. This ordinance provides that the Chicago Railways Company may make expenditures on the lines of the County Traction Company outside of the limits of the city for electric transmission construction and electric power and necessary track repairs and maintenance. It is not proposed to charge such expenditures to the capital account of the Chicago Railways Company.

Section 2 of the ordinance, with reference to the south track on West 12th street, provides that “* * * all expense of operation * * * of this ordinance shall be considered and treated as a part of the operating expenses of the system * * * pursuant to the terms of said ordinance of February 11, 1907, except however that nothing herein contained shall be construed to permit or authorize the Chicago Railways Company to rehabilitate or re-equip said south track or to pay any part of the cost of repairs of that part thereof between south 52nd avenue and south 60th avenue * * *.”

This section further provides that in case the County Traction Company shall abandon its south track on West 12th street, then the Chicago Railways Company may make such track and electric line equipment repairs as shall be deemed necessary and that “* * * the expense thereof shall be considered and treated as a part of the operating expenses of the system * * *.”

As to the expenses on streets other than West 12th street in the Town of Cicero, Section 3 of said ordinance provides that the Chicago Railways Company “* * * shall be permitted to charge * * *” the amount thereof “to its operating expenses in its accountings with the City of Chicago under the provisions of said ordinance of February 11, 1907.”

Section 4 of this ordinance provides that the use of all tracks in the Town of Cicero are granted upon the condition that the street railway tracks shall be maintained as part of the system of the Chicago Railways Company “* * * excepting as to the provisions of said ordinance of February 11, 1907, relating to the purchase by the City of Chicago or its licensee of the street railway system of the Chicago Railways Company.”

Section 4 provides that “* * * nothing herein contained shall be construed to permit or authorize the Chicago Railways Company to rehabilitate or re-equip the said railways tracks * * *.”

Section 5 provides that the cost of power used in the operation of cars on the streets named in the ordinance “* * * shall be considered as a part of the operating expenses of said Chicago Railways Company’s system of street railways * * *.”

The ordinance and operating agreement in our opinion negative the idea that the cost of constructing or operating the lines outside of the city limits or any rehabilitation thereof may be charged to the capital account of the company.

Section 6 provides that—

“This ordinance and all the rights and privileges granted hereby shall continue only during the pleasure of the City Council of the City of Chicago and shall terminate whenever the City Council of the City of Chicago shall elect and shall signify its election by an ordinance revoking and annulling this ordinance * * *.”

While the question before us is not entirely free from doubt, it is our opinion owing to the peculiar facts attending the particular case, that the ordinance submitted to us may be passed by the city if it is deemed for the best interest of the city to do so.

We suggest the following changes be made in the ordinances and operating agreement submitted to us:

1. Sections 1 and 9 of the Chicago ordinance should be changed so as to require the consent of the City of Chicago to the termination of the operating agreement by either of the companies. Section 5 of the Cicero ordinance and Section 10 of the operating agreement should also be changed in this respect.

2. Insert in Section 4 of the ordinance of the City of Chicago a provision that in case of abandonment by the County Traction Company and the consequent later use by the Chicago Railways Company of the lines mentioned in Section 3 of said ordinance, then in the event of acquisition of the lines of the Chicago Railways Company by the city under the provisions of the ordinance of February 11, 1907, all properties of the County Traction Company mentioned in Section 3 of said ordinance shall become the property of the City of Chicago without additional compensation.

3. Section 11 of the operating agreement which provides that—

“* * * if the County Traction Company shall so terminate this contract it shall repay to the Chicago Railways Company the amount paid to the County Traction Company by the Railways Company as the cost of furnishing labor and material therefor * * *”

should be changed so as to provide repayment to the Chicago Railways Company in the event of termination of the contract by the City of Chicago, the Town of Cicero or the Chicago Railways Company.

We have prepared new drafts of the two (2) ordinances and operating agreement submitted to us which we are transmitting herewith. These new drafts include the changes suggested herein as well as some other changes which have occurred to us. We have underlined the changes in the drafts, herewith transmitted to you, which differ from the ordinances and operating agreement which you submitted to us.

These changes are merely recommendations which may or may not be adopted in the discretion of your Committee

without affecting the validity of the ordinances and operating agreement under consideration.

Yours very truly,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 17, 1913.

MR. W. F. HEINEMANN, 1703, No. 43 W. Monroe street, Chicago, Illinois.

Dear Sir:

Your request for information in recompelling the Rock Island Railroad Company to put toilet rooms in various stations on its line, has been referred to me for reply.

Hurd's Revised Statutes of 1911 at page 1821 provides:

"That all railroads in this State carrying passengers or freight shall, and they are hereby required to build and maintain depots for the comfort of passengers and for the protection of shippers of freight, where such railroad companies are in the practice of receiving and delivering passengers and freight, at all towns and villages, having a population of two hundred (200) or more, on the line of their roads, and roads leased or operated by them."

And at page 1828 provides:

"* * * and at all depots where said railroad companies stop their trains regularly to receive and discharge passengers in cities and villages, for at least one-half hour before the arrival of, and one-half hour after the arrival of any passenger train, cause their respective depots to be open for the reception of passengers; said depots to be kept well lighted and warmed for the space of time aforesaid."

Section 1852 of The Chicago Code of 1911 provides:

"PLACES OF EMPLOYMENT—SEPARATE WATER CLOSETS FOR MEN AND WOMEN—NUMBER.) In all places of employment where men and women are employed, separate and sufficient water closets shall be provided for males and females. Water closets for men shall be

plainly marked 'Men's Toilet' and water closets for women shall be plainly marked 'Women's Toilet.'

In all places of employment, one water closet shall be provided for every twenty-five males or less number, and one water closet shall be provided for every twenty females or less number. Such water-closet facilities shall be furnished upon at least every second floor. Where there are employes in any basement, such basement shall be considered as one floor."

You have asked if there is not some way by which you can compel the Rock Island Railroad Company to put toilet rooms in the various stations along its line, and in response to that question I suggest that you may be able to procure the passage of an ordinance by the City Council specifically requiring this, if the provisions above set out are not deemed by you sufficient. I assume that you want toilet rooms in these stations for the use of the public and not the employes, and in that case, in my judgment, additional legislation must first be procured.

Trusting that this information may be of assistance to you, I remain

Respectfully yours,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 17, 1913.

HON. JOHN MCWEENY, General Superintendent of Police.

Dear Sir:

Your letter of the 11th inst. with enclosure, requesting an opinion as to whether a number plate without the letters "Ill." complies with the automobile ordinance, has been referred to me for reply.

The automobile and motorcycle law of the State of Illinois in force July 1, 1911, provides in Section 3:

"* * * said number plates shall also bear as part of such number the letters 'Ill.' and each of such letters shall be not less than one inch in height."

Section 4 provides:

“* * * that nothing in this section contained shall be so construed as to prevent the use of any rear number plate other than that furnished by the Secretary of State, if such other plate and the numbers thereon shall correspond exactly in color and shape and size with the number plate provided for in Section 3 of this act”

The Chicago Code of 1911 as amended July 1, 1912, by Section 2728j provides that:

“The number plate with which a motor vehicle shall be equipped in the rear in compliance with the statute regulating motor vehicles and motorcycles, shall, when the same is on a public highway, be lighted from sunset to one hour before sunrise in such a manner that the number on such plate shall be unobstructed and plainly legible and intelligible at a distance of at least one hundred and fifty (150) feet from such illuminated plate, etc.”

I am of the opinion that all number plates used on automobiles must contain the letters “Ill.” after the number in accordance with the provisions of the statute regulating same.

Respectfully submitted,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 17, 1913.

HON. JOHN MCWEENY, General Superintendent of Police.

Dear Sir:

Your communication of the 10th inst., requesting an opinion as to the right to use trailers attached to auto trucks in the city streets, has been referred to me for reply.

The streets of Chicago are public thoroughfares to be used primarily for passage and travel.

In *Moses v. P., Ft. W. & C. R. R. Co.*, 21 Ill. 516, 523, the Supreme Court says:

“A street is made for the passage of persons and property; * * *. To say that a new mode of passage shall be banished from the streets, no matter how much

the general good may require it, simply because streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age."

In *Macomber v. Nichols*, 34 Mich., 212, 216, the court says:

"Improved methods of locomotion are perfectly admissible if any shall be discovered, and they cannot be excluded from the existing public roads, provided their use is consistent with the present methods.

A highway is a public way for the use of the public in general, for passage and traffic, without distinction. *Starr v. C. & A. Railroad Co.*, 4 Zab. 597. The restrictions upon its use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement, and the inconveniences must be submitted to when they are only such as are incident to a reasonable use under impartial regulations. When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods; and it cannot be assumed that these will be the same from age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience or even to the injury of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them; and if the law should preclude the adaptation of the use to the new methods, it would defeat, in greater or less degree, the purpose for which highways are established."

In *McCarter v. Ludlum Steel & Spring Co.*, 71 N. J. Eq., 330, (1906) the court held that the use of a traction engine and trailers carrying coal over the streets of a city does not constitute a nuisance *per se*.

Considering the authorities above referred to and the purpose for which streets are opened and maintained, I am of the opinion that the use of trailers on auto trucks in the streets of this city would not, of itself, be unlawful.

While the use of trailers on the streets in the absence of an ordinance prohibiting or regulating the same is legal, yet this matter may be regulated by ordinance, providing such ordinance is reasonable in its regulation.

If you desire that such an ordinance be drafted, I will be glad to take the matter up with you at your convenience.

Respectfully yours,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 20, 1913.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Your communication of the 3rd instant *in re* claim for damages of Martino Rizzo has been referred to me for reply.

Upon investigation I find that Martino Rizzo was employed by C. I. Smith, Acting Assistant Superintendent of Streets for emergency employment December 22nd, 1910.

I assume in this opinion that said Martino Rizzo was injured as alleged in his petition presented to the City Council. It appears from said petition that Martino Rizzo was aware of the dangerous nature of his employment.

It is a well established legal proposition that when one voluntarily enters into employment and continues therein, having knowledge of the dangerous nature of the same, he thereby assumes all the risk incident to such employment.

Chicago & A. R. Co. v. House, 172 Ill. 601.

Clark v. Liston, 54 Ill. App. 578.

Cummings v. Chicago Northwestern Railroad Company, 89 Ill. App. 199.

The petition sets out that Rizzo told the boss in charge that he wished to be relieved of his work because of the dangerous condition surrounding him but was ordered by the boss and police to keep on with the work.

The only power of the city to do the work in which petitioner was engaged arises from its police powers but if it were to be contended that the work was not done under such power, then the acts of the officials of the city were *ultra vires* and no action against the city could be maintained for their acts.

The work engaged in by Rizzo being done under the

police power, the city is not liable under the doctrine of *respondeat superior* for injuries sustained by reason of the unlawful or negligent acts of its officials.

Chicago v. Selz-Schwab & Co., 202 Ill. 545.

Tollefson v. City of Ottawa, 228 Ill. 134.

Culver v. City of Streator, 130 Ill. 238.

Wilcox v. City of Chicago, 107 Ill. 334.

The law seems settled in this state that damages for injuries sustained in the manner as alleged by this petitioner are not recoverable from a municipality.

I am, therefore, of the opinion that city is not legally liable for the injuries sustained as alleged.

Very respectfully yours,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 21, 1913.

HON. EDWARD COHEN, City Collector.

Dear Sir:

In your letter of the 13th instant, herewith returned to you, you ask for an opinion as to the transferability of the various classes of licenses issued through your office.

Section 1520 of Chapter XLI of the Municipal Code of 1911 entitled "Licenses," provides that,

"No license granted under this ordinance shall be assigned or transferred, except as hereinafter provided, nor shall any such license authorize and person to do business or act under it but the person named therein. Any person to whom any license shall have been issued may, with the permission of the mayor, assign and transfer the same to any other person, and the person to whom such license is issued or the assignee of such license shall surrender such assigned license and have a new license issued for the unexpired term of the old license authorizing the assignee or transferee of such license to carry on the same business or occupation at such place as may be named in such license * * * provided, further that nothing herein contained shall be held to authorize the

assignment or transfer of saloon, dramshop, auctioneer's or runner's licenses; such licenses shall be non-assignable and non-transferable."

Section 1696 of the same Code, Chapter LI, provides amongst other things that,

"The word 'ordinance' whenever used in any section of this code, shall be held and taken to mean this entire code, including each and every section thereof."

Understanding the word "ordinance," where used in the first of the above quoted provisions, in the sense defined in the second, it seems clear that the provision quoted from section 1520 amounts to a provision that every license issued under any section of the Code shall be assignable as provided by Section 1520 with the exceptions therein specified.

This seems clear enough and easy to be understood; but we assumed that there must be some special reason for your asking for advice in this matter and the undersigned, therefore, interviewed you and your assistant, and Mr. Bailey in the city clerk's office, with a view to finding what the precise difficulty was. It transpired that some assignment of amusement licenses had been held up since the beginning of the present year because of a difficulty which had arisen in the office of the health department. The undersigned then saw Doctor Young, and learned from him that the difficulty had arisen in regard to a place of amusement at Number 750 West Seventy-ninth street. The party who took out the license for this place had, it seems, wholly failed to live up to his agreement as to ventilation and other sanitary precautions; and his license had therefore been revoked or suspended. This party had then preceded to take an assignment of a license issued in respect of a place situated somewhere in Ravenswood; and he claimed the right to operate his place on Seventy-ninth street under this assigned license? Doctor Young obtained an opinion from this office on the 27th of December last. This opinion is written by Mr. Hornstein and it advises in substance that the party having the place on Seventy-ninth street could not run this place under the license assigned to him as above stated.

It does not seem to us that the action of this party which

is complained of, raises any question as to the assignability of amusement licenses. The question raised has regard to the effect of such assignments. The license which he purchased and had assigned to him, by its terms, gave to the licensee a right to carry on a certain kind of amusement at a certain specified place in Ravenswood. The assignee of this license would only take, by virtue of the assignment, the right to carry on the amusement of the place specified in the license. In saying this we are not overlooking the fact that Section 1520 above quoted speaks of the new license to be issued in place of the assigned license as authorizing the assignee:

“to carry on the same business or occupation at such place as may be named in such license.”

Even if it were to be assumed that, under this provision, it would be competent for the proper authorities to issue a new license for the balance of the term authorizing the transferee to carry on the same business at some other place than that named in the old license, such new license could only be issued on the assignee complying with all the requirements of the amusement ordinance as regards the character and construction of the place in which it was proposed to carry on the amusement.

We do not think that the trouble which has arisen with this party who has the place of amusement on Seventy-ninth street furnishes any good reason why your office, or the city clerk's office, should hold up assignments of amusement licenses.

The only cases which would seem likely to cause any difficulty are cases in which the candidate for a license is required to pass some examination, or to show that he possesses certain qualifications, before the license is to be issued. You will notice, however, that the method provided for carrying out the assignment is that the assignee is to surrender the old license and that the new license is to be issued to him for the balance of the term. We are of the opinion that, in the class of cases just referred to, before the new license should be issued, the persons having authority to issue such license would be bound to see that the assignee possessed the required qualifications. We do not think that Section 1520, cited above,

would confer upon the assignee of such a license the right to insist upon a new license for the balance of the term, irrespective of the question as to whether he did or did not possess the required qualifications.

If there be any further specific questions not covered by this opinion, as to which you desire to be advised, and if you will state these questions for us, we shall be happy to answer them to the best of our ability.

Yours respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 21, 1913.

MR. ALBERT J. W. APPELL, Chief Assistant Prosecuting Attorney.

Dear Sir:

Answering your letter of January 30, 1913, wherein you ask to be advised whether prosecution can be maintained against the owner of the livery stable at 2258 West Taylor street under Section 616b, (amended on November 18, 1912, C. P. p. 2343) of the Chicago Code of 1911, we beg to submit the following:

Section 616b, as amended, provides as follows:

“It shall be unlawful for any person, firm or corporation to construct, locate, conduct or maintain any boarding, sales or private stable or barn for stabling or keeping of horses on the front two-thirds of any lot on any street where one-half of the buildings on both sides of the street between the next nearest intersecting streets are used exclusively for residence purposes without the written consent of a majority of the property owners according to frontage on both sides of the streets. Such written consent shall be obtained and filed with the Commissioner of Buildings before a permit is issued for the construction or alteration of any building or place for such purpose. Provided that in determining whether one-half of the buildings on both sides of the street are used exclusively for residence purposes any building

fronting upon another street and located upon a corner lot shall not be considered."

This section does not necessarily include livery stables. Separate provision is made for livery stables under Section 712 of the Chicago Code of 1911. Under this section it is unlawful

"to locate, build, construct or maintain on any lot fronting on any street or alley in the city in any block in which one-half of the buildings on both sides of the street are used exclusively for residence purposes or within fifty feet of any such street, any building or place used for a * * * livery stable * * * without the written consent of a majority of the property owners according to frontage on both sides of such street or alley."

In *City of Chicago v. Stratton*, 162 Ill. 494, the court held that the city has the power to pass ordinances directing the location of livery stables under Clause 82, of Section 1 of Article V of the Cities and Villages Act.

It appears from correspondence on file in this office that alterations were made in the premises under consideration in 1909 for the purpose of establishing and maintaining a private barn to be used for stabling of horses of Mr. McGovern, one of the contractors of the city. On or about May 19, 1911, the present owner moved into the building and established a livery stable. Protest was then made to the building department. The building department then requested this office to prepare an opinion on this subject. On April 11, 1911, we advised Murdock Campbell, Commissioner of Buildings, to require, "the written consent of a majority of the property owners on both sides of Oakley boulevard, between Taylor and Polk streets and also on the north side of Taylor street between Oakley boulevard and Irving avenue and on the South side of Taylor street between Oakley boulevard and Leavitt street."

Acting upon this advice the building department were about to take steps to prevent the use of the premises as a livery stable because of the failure to file frontage consents. The owner then proposed to have the premises revert back to a private stable. The question was then presented to this department whether the premises would have to comply with

the provisions of our ordinances requiring stables in residential districts to be constructed on the rear one-third of a lot.

In our letter of May 19, 1911, addressed to Murdock Campbell, we stated that “* * * the use of the premises as a livery stable changed the character of the place from that of a private stable as effectually as if it had for a time been used for any purpose distinct from that of a stable, and further that if the premises are now desired to be used for a private stable the case should be considered as one where a private stable is sought to be located for the first time and that the ordinances now in force, relative to private stables should govern.” Apparently the change from a livery stable back to a private barn was not made.

Our investigator reports that the premises are now being used as a livery stable. We have also ascertained that no frontage consents have been filed in compliance with either Section 616b or Section 712. The owner is now operating under a license issued for the year 1913. We have been unable to ascertain just how it happened that the license was issued without the securing of the necessary frontage consents.

Prosecution may be begun against the owner of the premises either under Section 616b, aforesaid, or under Section 712, aforesaid, of our Code. We recommend, however, prosecution under Section 712. If prosecution is begun under 616b, which was passed on November 18, 1912, after the business was established the question of retroactiveness might be raised, which would be avoided in a prosecution under Section 712.

The fact that the owner operates under a license issued by the city would not in our opinion affect the prosecution of the owner or embarrass the city in any way. In granting a license the city does not certify that all ordinances have been complied with. Such license cannot be used as a cloak to protect persons from prosecution for violations of the ordinances of the city.

We suggest in this connection in view of the fact that frontage consents have never been filed, that the license has not been properly issued. This being the case the Mayor

has the power to revoke the license under which the livery stable now operates.

Section 1512 of the Chicago Code of 1911, provides that:

“* * * The Mayor shall also have power to revoke, for cause, any license granted by him * * *.”

In our opinion the failure to file frontage consents for a livery stable in a residential district in compliance with the ordinances on this subject would be sufficient cause to justify the Mayor in revoking the license.

We are transmitting herewith copies of the two letters addressed to Murdock Campbell, herein referred to.

Yours respectfully,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 27, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

The Corporation Counsel has handed to the undersigned a copy of a letter addressed to you by Mr. Lawrence Heyworth, dated February 13, 1913, and suggested that a letter be written you in regard to the subject matter of the same.

Mr. Heyworth states that there is now no lease or option outstanding on the lake shore property of The Chicago Dock & Canal Company, and says that he believes he can get for the City a most favorable lease of the strip needed for harbor improvement.

The questions of title here involved were treated in detail in our opinion to you of July 1, 1912. We will discuss here three heads, which are pertinent to the subject matter of Mr. Heyworth's letter, as follows:

(a) The power to buy lands.

(b) The power to enclose, make, protect, erect and construct “on their own lands” wharves, docks, moles, piers, breakwaters, etc.

(c) The power to fill in and reclaim submerged lands, the title to which is in the State of Illinois.

These are three separate and distinct matters.

The company, in Section 6 of its charter of 1857, is given the first of the above powers, namely, to buy at public or private sale, and to take and hold any and all lands that may be necessary for the uses and purposes of the company provided the same shall lie and be situated in Kinzie's Addition and shall not exceed in all fifty acres exclusive of land covered by water. This power unquestionably refers to land in Kinzie's Addition held in private ownership and above the surface of the water in 1857, when the company was incorporated by special Act of the Legislature and the limitation that the amount "shall not exceed in all fifty acres of land" just as certainly refers to these lands in Kinzie's Addition in private ownership, and the language "exclusive of land covered by water" also without doubt refers to such of "their own lands" as might be excavated and removed for the purpose of making canals, slips, etc.

Attached hereto is a plat of these lands showing the shore line of 1857. The lands in white westerly from this shore line of 1857 are the lands that were actually acquired by the company from private owners. It also appears from said plat that a portion of the Michigan slip is West of the shore line of 1857, and to such portion of the slip the above quoted language "exclusive of land covered by water" most surely applies and not to the submerged lands under the public waters of Lake Michigan, title of which was and is in the State for the whole people of the State, although Mr. Heyworth contends otherwise.

Section 4 of the company's charter confers:

"The power to inclose, make and protect, and also to erect and construct, *on their own lands* and on the shore and in the navigable waters of Lake Michigan, (so that they do not in any manner obstruct or prevent the free navigation of the same, in front of *their own lands and premises*, and in front of the premises of such person or persons as may assent to the same), wharves, docks, moles, piers, breakwaters and such other erections, protections, improvements and conveniences for the safety and accommodation of boats and vessels, and the security and advantageous use of *their own property*, wharves and

docks, or for the purposes of convenience in the use and enjoyment of said property by the said company, as the board of directors of said company may deem necessary and proper."

This section grants the second of the above named powers. While the foregoing language is ample to confer all necessary power upon the company to make, protect and construct all necessary structures for navigation and commercial purposes, it does not include the filling in and reclamation of twenty-five or thirty acres of land, which have not been devoted to, and large portions of which are not conveniently located for such purposes.

Section 5 of the company's charter confers:

"Power to excavate, maintain, preserve and keep open canals, basins, slips and such other ways, with their embankments, supporters and appurtenances, for the entrance of boats and vessels of all kinds from the lake, and also from the Chicago harbor and river; to levee *part of their property*, lands and premises as may, by the board of directors of said company, be considered necessary and convenient for the profitable use and enjoyment of said property, and for the interests of said company."

(See Private Laws of 1857, Vol. 1, pages 500-501.)

This section may be construed to allow them to fill in with embankments and supporters a limited and necessary portion for the protection of such structures as are authorized in Section 4, but just as clearly does not confer power to fill and reclaim the submerged lands of the State, which are not or cannot be used for commercial purposes.

The phrase "their own lands" occurs twice in Section 4 and the phrase "of their property" occurs once in Section 4 and once in Section 5. These phrases clearly refer to the private lands that the company might buy at private or public sale in Kinzie's Addition not exceeding fifty acres as authorized in Section 6, and just as clearly do not refer to the submerged lands of the state.

The charter of the company does not confer the third power above indicated except to a limited extent by implication. It contains no language which authorizes and empowers the company to fill and reclaim land, not to exceed fifty acres

or any other amount, except (by implication as stated) such filling in as might be necessary to protect its legally authorized structures.

From twenty-five to thirty acres of land now claimed by the company (shown in green, yellow and pink on the accompanying plat) lie East of the shore line of 1857 and have been filled in and reclaimed by the company since its incorporation.

The company does not own this land in fee simple as stated by Mr. Heyworth, and it has not been filled in and reclaimed in accordance with any terms contained in its charter as claimed by him. We think it perfectly fair and proper to state that in our opinion neither Abraham Lincoln nor the State Legislature ever intended to place the construction upon the language of the charter now contended for by Mr. Heyworth.

At the request of the undersigned the Committee on Harbors, Wharves and Bridges in March, 1912 caused an accurate survey of the entire tract claimed by The Chicago Dock & Canal Company to be made, which survey showed the total amount of land exclusive of land covered by water to be 51.29 acres. Of this only about 20 to 25 acres are lands obtained by the company from private persons, and of this tract we have had an Abstract of title made. Of the balance of the tract (comprising the green and yellow portions as per plat) there is nothing of record from which to make an Abstract except a few scattering leases. No deeds conveying this property to or from any owners are to be found of record. This is in line with our conclusions above to the effect that these lands have been acquired by filling in and reclamation, and not by patent or deed.

The last paragraph of Mr. Heyworth's letter intimates that the company is willing to make a favorable lease to the City of Chicago of a narrow strip of land along the eastern portion of the tract for harbor purposes with an option for purchase at any time within the next ten years. He states that this is proposed in order to keep speculators out, who might seek to hold up the city and to avoid future litigation over the title. He states in earlier portions of his letter that

the filling in of the tract has been carefully watched, and that the directors of the company, whom he names, "have acted under the most careful real estate and legal laws." Permit me to say that I believe this offer of a lease to the City is another most carefully and well considered move on the part of the company to protect its claim of title and a further step to clear, quiet and confirm the same.

If the City were to accept a lease from the company it could not then deny the company's title for the elementary reason that the lessee is estopped to deny title of the landlord. Such action on the part of the City would be a complete abandonment of the position taken that the title is in the State, and the City would then be in the position of having to pay full value for the land that it has already declared to be in the State, and a grant of which from the State it is now seeking by the new Harbor Bill prepared by the writer and introduced into the State Senate by Senator O'Connor on January 29, 1913.

We may further state that the City has no power under the present law to enter into such lease, that no such power is included in the present Harbor Bill, and that if such a provision should be included it would very likely raise a storm of disapproval from all citizens who object to lake front encroachments and the claims of those who make them, and might seriously impair the chances of the Bill becoming a law. However, this is a question of policy and not of law, and if you should deem it desirable to include a provision authorizing the City to enter into such lease a proper amendment will have to be drafted. There is still time for this, as the Bill has not yet been considered by the Committee.

Why is not The Chicago Canal & Dock Company, if it is so certain that it possesses a fee simple title, content to wait until the City acquires the necessary power to purchase under the proposed Bill, and then sell to the City without the intervention of a lease?

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 28, 1913.

HON. JOHN MCWEENY, General Superintendent of Police.

Dear Sir:

Sometime ago, Assistant Chief Schuettler, as Acting General Superintendent, sent a letter of inquiry to this department concerning the right of undertaker J. B. Lanyon to operate what is designated as a garage at No. 6321 Eggleston avenue, without a license and without securing frontage consents.

The matter was held in abeyance in this office because there was an amendment to the Fire Prevention Ordinance involving "garages," pending before the Committee on Buildings. This amendment has now become a law, and our reply to the inquiry takes this into consideration.

From the files attached to the above mentioned letter, it appears that Mr. Lanyon conducts an undertaking establishment at the number in question, and uses, as a part of that business, four machines, consisting of an auto truck, an auto hearse, an auto ambulance and a touring car.

The question presented is whether a building used for housing these machines in connection with the undertaking business constitutes a garage within the meaning of Section 2683 of The Chicago Code of 1911, thereby making it necessary for the owner to secure a license and in some cases frontage consents in order to operate same.

The license officers, in their report, call attention to the fact that there is an apparent conflict in the city ordinances in regard to the meaning of the word "garage" as defined in two different ordinances now in force. The Code (Sec. 2683) defines the word "garage" as follows:

"The word 'garage' as used in this article shall be held to mean, and is hereby defined as meaning, any barn, stable, *building or other place* within the city where automobiles, autocars or any similar self-propelling vehicles are kept or let for hire or reward to any person, whether such vehicles be so hired out or let with or without an operator for same, or where such vehicles are kept ready for use and where rent is paid to the keeper thereof for such keeping.' "

The new Fire Prevention Ordinance, passed July 22,

1912, as amended February 14, 1913, gives the following definition of a "garage."

"SECTION 144. Definition.) (a) The term 'garage' as used in this Article shall be construed to mean a building, or that portion of a building, wherein are *housed, for rent, care, demonstration, storage or sale, one or more self-propelled vehicles or other wheeled machines containing in the tanks thereof, volatile inflammable liquid for fuel or power; also all parts of building and all adjoining structures or buildings not separated from the garage proper by walls of brick or concrete extending at least three feet through the roof and having openings, if any, protected on both sides of walls by approved automatic fire doors, constantly closed except when necessarily temporarily opened for passage.*

(b) *A garage housing not more than four such vehicles shall be termed a 'private garage.'*

(c) *A garage housing five or more such vehicles shall be termed a 'public garage.'*"

It will be observed that in each case the definition is limited to the words "as used in this article." Hence, there is no real inconsistency, as between these two ordinances, even though it would have been well to preserve uniformity in the definition. The two ordinances relate to different requirements entirely and do not conflict in any way.

In the case of the Fire Prevention Ordinance all the provisions of same relate to the safety of the building and for this purpose there is a distinction drawn between a building containing five or more machines and one containing less. In the case of Section 2683 of The Code, which forms a part of Article VIII of the Chapter on Vehicles, the purpose is regulation of the business instead of the building, and to accomplish this end a classification is made according to the use of the machines rather than the number of same, and the garage is public or private according to the use to which it is put. Hence, a garage within the meaning of that section may have less than five machines. There must, however, be more than one machine kept for hire or stored ready for use before it need be licensed as a garage, otherwise there would be an inconsistency so far as other sections of The Code dealing with public vehicles for hire, etc., are concerned.

Coming now to the question as to whether the particular place should be required to take out a license, we do not think you would be warranted in compelling them to do this.

With the possible exception of the touring car, the vehicles places there are undoubtedly used as a part of the equipment of the undertaking establishment. Under a very technical and narrow construction, the ambulance might be included among public passenger vehicles, but the ordinances regulating such vehicles are so clearly intended to apply to those that transport passengers who are capable of voluntary action that the other construction is far more reasonable and unquestionably the one intended by the Council. At best, there is only one vehicle used in such a way as to bring it within the meaning of "kept," "let" or "hire" as used in Section 2683 of The Code.

We are, therefore, bound to conclude that there is no garage license required at the place in question.

We return herewith four letters submitted by you.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 28, 1913.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

Replying to your favor of the 27th inst. wherein you ask for an opinion as to whether you can pay salaries and wages as shown by payrolls of employes of the Election Commissioners' office which rolls have not been certified or approved by the County Civil Service Commission or its president and secretary, beg to say.

Formerly, we are given to understand by your communication that it has been the custom of the president and secretary of the County Civil Service Commission to certify these rolls for payment and you ask particularly whether under the Civil Service law the Comptroller is prohibited from

paying salaries and wages unless certified by the Civil Service Commission. You doubtless have in mind Section 31 of an Act to regulate Civil Service of cities, (Hurd's Rev. Stat. 1911, p. 398) which provides:

"No comptroller or other auditing officer of a city which has adopted this act shall approve the payment of, or be in any manner concerned in paying any salary or wages to any person for services as an officer or employe of such city, unless such person is occupying an office or place of employment according to the provisions of law and is entitled to payment therefor."

You will notice that the language employed makes no provision for the certification by any Civil Service board whether of the county or of the city.

The caption of Section 31 in Hurd's addition to the statutes, reads:

"Comptroller to pay salaries only after certification."

This caption, however, is no part of the statute and is put in by the editor merely for the greater convenience of those referring to the statute book.

There is no mandatory provision in the statute for the City Civil Service Commission certifying any payroll.

The 39th section of chapter 34, (Hurd's Rev. Stat., p. 640) provides in effect that no *county* comptroller shall pay the salary of any employe, except in accordance with the provisions of law, so that this section clearly does not apply to you.

I am of the opinion, therefore, that your idea that you are prohibited from paying salaries or wages unless certified by the Civil Service Commission is not well founded, and no certification is required.

Yours respectfully,

JOHN W. BECKWITH,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MARCH 1, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You ask for an opinion as to whether,

FIRST: The money paid for special details of police assigned to licensed halls for which bar permits have been issued, can be applied for the creation of a fund available for the employment of additional policemen to be assigned to this particular class of work; and,

SECOND: Can the amounts of money paid for bar permits be used for the employment of special officers to be assigned for the purpose of preservation of order at affairs conducted in such licensed halls.

Paragraph 3 of Section 1 of an Act to provide for the setting apart, etc., of a police pension fund, in force July 1, 1911, Hurd's Revised Statutes of 1911, page 369, provides that:

“In each city * * * there shall be set apart the following moneys to constitute a police pension fund:
* * * Third. All moneys paid for special detail of policemen.”

The money, therefore, raised through payment for special details for licensed halls wherein bar permits are used, must be devoted to the police pension fund and your recollection in that respect is correct. Moreover, this construction of the law, even if doubtful, has been followed for years by the authorities charged with the enforcement of this particular provision and such a long term of practical construction by the officials would give even a doubtful statute the effect which I have indicated.

In regard to the second question as to whether the proceeds for permits for licensed halls can be used for employment of special officers, I am of the opinion that such money can be thus used, subject to the condition that 4 per cent. thereof must be devoted and set aside for the pension fund in accordance with the second paragraph of Section 1 of the Act hereinbefore referred to, which provides that:

“3 per cent. of all moneys received from licenses for the keeping of saloons and dramshops * * * and after

January 4, 1911, 4 per cent. of all such moneys shall be set apart for the purpose aforesaid."

These bar permits in effect are temporary licenses and the money received therefrom should be devoted to the extent of 4 per cent. thereof to the pension fund.

Yours very respectfully,

JOHN W. BECKWITH,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MARCH 4, 1913.

HON. CHARLES F. SEYFERLICH, Fire Marshal.

Dear Sir:

Some time ago, Chief J. C. McDonnell, of the Bureau of Fire Prevention and Public Safety, asked for an interpretation of Sections 144, 145, 146, 147 and 256 of the Fire Prevention Ordinance, with reference to the occupancy of buildings used as garages.

It would seem, from the letter in question, that there are buildings used as garages within the meaning of the term as defined in Section 144 of the said ordinance, where the upper floors are occupied for other purposes, in some cases for mercantile pursuits and in other cases as dwellings or sleeping quarters; and the question was whether the bureau was justified in giving the said ordinance a retroactive construction so as to forbid such occupancy and require the removal of same.

We observe that you include Section 256 as one of the sections under which you seek to enforce the provisions referred to above. Section 256 relates to premises which by reason of the nature, condition or quantity of their contents or their use, or by reason of overcrowding or defects in same have become perilous, and such places are therein condemned as nuisances. This does not relate particularly to garages, but includes all places which have become dangerous for the reasons given. So far as this section is concerned, the ordinance holds good whenever the conditions described therein appear. It is not in any sense retroactive, but relates to a

present condition, and it can be and should be enforced whenever there is a situation which warrants such drastic action.

Referring now to Sections 144 to 147 of said ordinance, which relate particularly to garages and the occupancy of buildings used as such, this department has repeatedly stated that an ordinance will not be held to be retroactive unless the wording of same clearly indicates that it was the intention of the law-making body to make it such.

In the present case the ordinance as originally passed did not make it plain that such was the intention. Therefore, even if it had not been amended, we would have been constrained to hold that you could not compel existing buildings to comply with same, so far as occupancy is concerned, although in all other respects you can compel the necessary changes in order to render them safe as required by the ordinance.

Whatever doubt there was originally as to this interpretation was recently removed when these sections were amended. Under Section 145, as amended, the application of the sections in question, so far as occupancy is concerned, is restricted to "buildings hereafter built or converted to the use of a public garage." (See C. P. Feb. 14, 1913, p. 3737.)

We are, therefore, of the opinion that the provisions in regard to occupancy of other parts of the building, apply only in case of buildings hereafter constructed.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

MARCH 6, 1913.

HON JOHN E. TRAEGER, City Comptroller.

Dear Sir:

We have your communication relative to the charging by the Board of Supervising Engineers to the Traction Renewal Fund the sums representing the depreciation of the Common-

wealth Edison Company in billing the Chicago Railways Company for current consumed by the latter company.

You ask whether or not such sum or sums may be legally charged to the renewal or depreciation fund in the manner set forth in the letter of Expert Accountant Willard, attached to your communication. The board in disposing of this charge in this manner bases its action on Section 2 of the "Traction Settlement" ordinance of February 11, 1907, which provides as follows:

"The expressions 'property of the company' or 'street railway system of the company' or equivalent expressions as hereinafter used, except where the context clearly indicates a different meaning, shall be deemed to denote all the property from time to time possessed or used by the Company in and about the street railway business conducted under the provisions of this ordinance, including all franchises, rights and privileges of every nature enjoyed or exercised or capable of being enjoyed or exercised in connection therewith, irrespective of the nature or extent of the Company's interest therein, and a similar construction shall be given to expressions relating to particular classes or species of the Company's property."

This paragraph cannot be found in the ordinance of February 11, 1907, to the Chicago City Railway Company nor in the ordinance of March 30, 1908, to the Calumet & South Chicago Railway Company, so that it is difficult to see how the action of the board is warranted with respect to these latter companies.

Taking up the question of whether the charges properly made with respect to the Chicago Railways Company, Section 16, Sub-head No. 2 of the ordinance of February 11, 1907, provides as follows:

"On or before the fifth (5th) day of each and every month of each and every year that the Company continues to operate said street railway system after the expiration of said three (3) year period of 'Immediate Rehabilitation,' the Company shall deposit with one or more of the said depositaries in a separate fund, appropriately designated, a sum equal to eight (8) per cent. of the gross receipts of said street railways and property for preceding month, which shall constitute a reserve

fund, for taking care of Renewals and Depreciation of said street railways and property; and out of the said fund the Board of Supervising Engineers shall from time to time authorize the payment by the Company of such amounts as are necessary to pay for renewals of the said street railways and property, the portion of said fund remaining unexpended to continue in said fund as a provision for the depreciation of said street railways and property and shall be disposed of as hereinafter provided. No payments shall be made by said Company out of said fund, except on the written certificate of the Board of Supervising Engineers, for renewals, which are hereby defined to be the replacement of any principal part of said street railways or of their equipment or appurtenances; and the Board of Supervising Engineers shall determine by classifications made from time to time what particular items of expenditure shall be considered as Renewals and what particular items of expenditure shall be considered as Maintenance and Repairs under the provisions of this ordinance.'

Mr. Willard's letter states that—

"This charge to the fund is based on the assumption that in drawing the ordinance, the 8 per cent. renewal fund included an amount to renew the generating stations which the railways at that time owned and operated but which since have been scrapped with the exception of less than enough to supply 20,000 k. w."

There has been no renewal by the company of the property thus thrown out of use and existence and of course there can be no depreciation of property already scrapped. The two objects of the fund as shown by the language used in Section 16, Sub-head No. 2, *supra*, are:

1st: To pay for renewals to street railway property; and

2nd: To retain the remaining fund, after the payment of renewals, to provide for a depreciation of street railway property.

Renewals, it will be noted, are defined to be "the replacement of any principal part of said street railways or other equipment or appurtenances." The board is given power to determine by classification what particular items of expenditure shall be considered as renewals, but it is doubtful whether this power can be construed as conferring absolute authority

or uncontrolled discretion on the board to designate a renewal, something which in the nature of things has passed out of existence and been scrapped and has not been renewed, thus doing violation to the plain meaning of the language employed in the section.

It seems to be the theory of the board that the depreciation in the present instance is applicable to the depreciation of the property of the Edison Company because this property is used in and about maintaining the electrical energy of the railways company.

In other words, the board transposes or substitutes a depreciation which would have taken place in the railways company's property (if it were in existence) to and for a like depreciation of the Edison Company's property, which performs the service the railways company's property would have performed. The flaw in this reasoning is that it defeats the purposes of the ordinance creating and maintaining a permanent fund for depreciation.

In the present instance, no property which the city can purchase either by recapture or at the expiration of the ordinance term is either renewed nor a fund provided for putting the property in good condition against the time of its taking over by the city. The Edison Company's renewal or depreciation fund is doubtless maintained by that company and the argument may be advanced that a charge for depreciation of the Edison Company's property in its service is included in and a part of the rate charged the railways company, and that it is immaterial that an amount covering depreciation is charged to the Traction Depreciation Fund as representing the depreciation in the Edison Company's property, as such a charge would have to be made to the Traction Depreciation Fund were the railways company's property in existence and performing the service. But it must be borne in mind that in the latter instance the railways property would either be renewed or provision made by a depreciation fund so that on the taking over by the city either it would be in first class condition or could be made so by the depreciation fund.

As it is now, however, under the present system of

charging herein considered, at the time of the taking over by the city, none of this depreciated property of the railways company comes to the city and the withdrawals made from time to time from the depreciation fund have merely kept up the Edison Company's property.

To be sure, the city's divisible net (55%) is increased, but that fact does not strike me as so important as the fact that the depreciatoin fund is indebted with improper items of charge and thus diminished in an unauthorized manner and for unwarranted purposes and such, as in my opinion, could not have been contemplated by the framers of the ordinance, the language whereof indicates no such intention.

The fund in question is to be used, I think, either for definite renewals of property or for the accumulations of a fund to take care of depreciation so that the city at the time of purchase may be able to take over the railway property in comparatively perfect condition, or in the alternative of its not being in perfect condition, for a fund in the hands of the company applicable and adequate to place the property in perfect condition. Charging amounts for the depreciation of the Edison Company's property to this renewal or depreciation fund in no way has a tendency to effectuate what I conceive to be the true purpose of this fund, notwithstanding the property of the Edison Company may be depreciated or require renewal by reason of its being used in supplying energy to the railways company. If it does so depreciate or require renewal, I can see no reason why such depreciation or renewal should not be taken care of by the Edison Company through methods which it may deem proper, but can see every reason why such renewal or depreciation should not be taken from the receipts of the street railways and am consequently of the opinion that this cannot be legally done.

As to the charging to the renewal fund amounts in connection with the Chicago City Railway and Calumet & South Chicago Railway Company, in connection with the use of electrical energy from the Edison Company, there seems to be no warrant for such a course in the ordinance.

Yours respectfully,

JOHN W. BECKWITH,
Acting Corporation Counsel.

MARCH 7, 1913.

DR. GEORGE B. YOUNG, Commissioner of Health.

Dear Sir:

You have submitted two questions regarding the construction of large tenement houses which were referred to the undersigned.

Your first question is whether a tenement structure built on an entire half-block, where lot lines are ignored, but consisting of distinct non-intercommunicating units divided by fire walls from foundation to coping, is to be construed as one tenement house, so that, under Section 440 of The Code, it can occupy 75 per cent. of the ground.

We judge, from the way your question is worded, that you have in mind the limitation placed on two or more separate buildings on one lot as set forth in Section 439, since 75 per cent. of the area may be occupied on inside lots under Section 440, and as high as 90 per cent. on corner lots.

We find nothing in any part of The Code in any way related to tenement houses, which limits the size of the same.

Under Section 250, buildings of Class I must have dividing walls which limit the area of each division of the building and make such divisions practically distinct buildings. Buildings of Class VII are also limited in area and require similar dividing walls. Section 482 provides that each division of such a building shall be considered a separate building except in one respect mentioned therein.

Since The Code explicitly limits the area of buildings in two classes, by a familiar canon of construction we are bound to assume that its silence with regard to other classes means that there is no limitation as to area in such other classes.

We do find, however, that there are a large number of provisions which for all practical purposes divide a building of Class VI, commonly known as tenement or apartment houses, into separate parts entirely distinct from each other. But while this is true as a general rule, it is a result that does not necessarily follow from a strict construction of these provisions; and it is quite possible, though perhaps not practicable in the case of a large building to observe strictly every

one of these provisions and still not have a building where the dividing walls extend from the foundation to the roof.

To illustrate our point, we call attention to the exceptions in Section 455, under which it would be possible to construct apartments which in the main are over each other but where the dividing wall did not extend from the foundation to the roof. Again, in the same section, there is provision for fireproof tenements where the dividing walls need not extend from foundation to roof and apartments can overlap each other on the different floors.

But these are extreme illustrations intended to bring out our point in the case of large buildings where dividing walls do not run through. The truth is that this question can be decided the same way by applying the rule that governs in cases where the walls do go through from foundation to roof. The same rule which causes you to construe two sets of apartments on a 50-foot lot with a common enclosed stairway between as one building, or which causes you to construe a front and rear set of apartments on a 25-foot lot with a common stairway between as one building, may be invoked to extend and multiply apartments in one building indefinitely.

The mere fact that a person conforms to the provisions of the ordinance in such a way that the apartments have dividing walls from the foundations to the roof does not change his right to have the structure construed as one building.

Therefore, our answer to your first question would be that the kind of structure which you describe would have to be construed as a single tenement house.

Your other question is whether such a structure as described above must have the same distance between the front portion and the wings extending in the rear as is required between separate buildings on the front and rear of a lot.

You call attention to Section 439 of the Code, which provides for an open space of 20 feet between front and rear buildings on the same lot in case one of them is three stories high. You then say that since no structure can be erected on the rear of a lot where there is an existing tenement without leaving this space, it must follow that when the front and rear are erected at the same time the same distance be-

tween them is necessary, even if the lot lines have been ignored, and the buildings are made structurally continuous by means of a circuitous and remote prolongation of the front buildings along the side of the lot or lots concerned.

As you state the proposition you are absolutely right—since you assume that there are actually two buildings on one lot. But if the structure were in fact one tenement house, then our answer to the first question would answer this one also. We cannot help surmising that the ‘circuitous and remote prolongation of the front building along the side of the lot’ is in fact the very kind of building which we have construed as one building in our answer to your first question.

While there may be some features about a case of this kind that may seem unreasonable at first blush, or at least puzzling, yet when we come to a final analysis, we find that it harmonizes with the general plan or scheme of the ordinances in relation to tenement houses. These contemplate that 75 per cent. of all inside lots may be covered by tenement houses, individual, double, triple or one large house covering them all, as the case may be; also that 90 per cent. of the two corner lots may be covered this way. The builder may distribute the structures over the lots in any way he chooses. This being the case, it would be absurd to say that when one undertakes to build over the entire half block, a plan under which a more advantageous distribution of the vacant space is almost certain to occur, he cannot use 75 per cent. of the lot because at some point a portion of his building extends around to the back and must have a 20-foot space.

Such a construction of The Code would make Section 440 conflict with Section 439, whereas, we are bound, wherever possible, to construe the two sections of the ordinance together and so as to make them harmonize with each other.

We, therefore, take it to be the clear intention of Section 440 that where a tenement building extends around a half-block, or nearly so, the owner may distribute the space which the ordinance requires to be kept vacant as he chooses as long as he maintains the percentage necessary, with due regard to necessary courts, etc.

As to Section 439, it is intended to check the too ravenous

consumption of the lot without leaving the means for a proper amount of light and air, as would be too apt to be the case not so much when a structure of half a block is built as when one lot is built up with two structures.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

MARCH 24, 1913.

HON. LEWIS D. SITTS, Chairman, Committee on Gas, Oil and Electric Light .

Dear Sir:

On the 18th inst., we received a communication from the City Clerk to the effect that he had been directed by your Committee at its meeting held March 13th to request this department to draft and submit to your Committee an ordinance revising the rates charged by the Chicago Telephone Company along the lines of memorandum attached to his communication, which memorandum is entitled, "Recommendations of Mr. Bemis as Revised by the Committee."

We have accordingly prepared and submit herewith a draft of the ordinance requested. The draft of ordinance has been submitted to Prof. Bemis and approved by him as correctly stating his recommendations as revised by your Committee.

The draft of ordinance substitutes new sections for Section 4 and Section 6 of the Chicago Telephone Company ordinance of November 6, 1907. The caption to Section 4 of said ordinance was "Telephone System of City—Free Telephone Service to City," and the caption to Section 6 of said ordinance was "Maximum Rates Fixed—Service and Equipment." The corresponding sections in the draft of ordinance submitted are numbered Section 1 and Section 2, respectively.

Section 1 in the draft of ordinance, in addition to preserving the provisions of Section 4 of the former ordinance, provides for free telephone service to the Board of Election

Commissioners throughout the present or any future city hall. No disposition is made of any claim that the Telephone Company may possibly assert for service furnished by it to the Board of Election Commissioners from the time when the Board moved into the present city hall up to the date when the new ordinance goes into effect. The committee gave no instructions on this point.

Section 1 also extends the free service of the Board of Education to include service from the telephones in the central office of said Board of Education to the various public schools of the City of Chicago where telephones are or shall be installed.

Section 2 in the draft of ordinance fixes the maximum rates and charges of the Chicago Telephone Company for a period of five (5) years from and after the passage of the ordinance and its acceptance by the Telephone Company in accordance with the recommendations of Prof. Bemis as revised by your Committee.

This section also provides:

1. That after the acceptance of the ordinance the Company shall not furnish with the right to the unlimited use a single party business line at the rate of \$125.00, or at any other rate, per year and shall not furnish with the right to transmit outgoing messages without limit and without any charge per message a single party business line or lines at the rate of \$1.00 or at any other rate per day; provided that present subscribers to said two classes of service shall have the right to a continuance thereof at the rates prescribed therefor in the ordinance of November 6, 1907.

2. The Company shall install with each nickel first telephone located in a residence a push button or other device which will enable the subscriber in an emergency to call the operator without the deposit of a nickel. Said push button shall be installed on all telephones in connection with new installations, moves and changes made after six (6) months from the time the ordinance goes into effect, and within two (2) years after the ordinance goes into effect, said push button shall be supplied to all nickel first users requesting it, and

within three (3) years all nickel first telephones shall be equipped with said push button or device.

3. The Company shall not charge more than five (5c) cents for each three-minute message and not more than five (5c) cents for each additional three minutes or fraction thereof between Austin and Oak Park; between Rogers Park and Evanston; between Lawndale and Morton Park; between Longwood and Evergreen Park; between Mont Clare and River Grove, and between Mont Clare and Oak Park; and said Company shall have the right to apply the same rate between other contiguous places just within and just without the city limits when conditions in its opinion may justify the charge of said five-cent rate.

4. Each subscriber to measured service may have a meter installed upon his premises at a rate of not to exceed \$2.50 per year each.

5. The Company shall publish in every issue of its directory all rates for local exchange service and all rules and regulations for subscribers and shall embody same in a folder to be given to any subscriber on application.

6. The Company shall charge not to exceed \$1.00 where service is moved from one address to another, provided there is a telephone which can be used without change at the new location.

7. The Company may charge for reinstatement of service when cut off for non-payment or other breach of contract, \$2.00 in each case.

8. The Company is authorized to supply special facilities and service at rates alike to all subscribers similarly situated for periods of less than one (1) year, and to furnish appliances not a part of standard equipment, as may be arranged for between the Company and its subscribers.

9. The Company may adopt and enforce the following rules and discontinue telephone service for any of the following reasons, viz:

(a) For non-payment of any amount properly due from subscriber.

(b) For malicious interference by a subscriber to party line service with the service furnished to other subscribers on the line.

(c) For the securing of service or permitting it to be secured through coin box telephone without payment therefor.

(d) For permitting the repeated use of unlimited service telephones by persons not entitled thereto.

(e) For using or permitting the use over the Company's equipment of foul, abusive or profane language or for impersonating any other individual with fraudulent or malicious intent.

(f) For habitual use of telephones, particularly on party lines, for conversations in excess of five minutes each.

The City Council may at any time amend the subdivision of the ordinance relative to rules and regulations by striking out any portion thereof after public hearing by an appropriate council committee and a finding that such portion is the cause of injury to the telephone service.

10. That with reference to local exchange service, the terms "message" or "conversation" shall mean a message or conversation not to exceed five minutes in duration.

Section 3 of the draft of ordinance provides that it is one of the conditions of the passage of the ordinance that the company shall make a total increase in the wages of its employes (exclusive of those in the executive or commercial departments) amounting to not less than \$320,000.00 during the year beginning with the date when the ordinance goes into effect, and that the company shall maintain during the five years for which the rates are fixed by the ordinance, the employes' pension, sickness, accident and death benefit scheme of the American Telephone & Telegraph Co.

Section 4 of the draft of ordinance provides that the city electrician shall hear complaints and endeavor to adjust differences between the Company and its subscribers or persons who desire to become subscribers and to make reports in regard to the same to the Gas, Oil and Electric Light Committee.

Section 5 provides for a forfeiture of the Company's rights under the ordinance of November 6, 1907, and under the draft of ordinance in case the Company makes default in

the observance of the agreements, duties or obligations therein imposed upon it.

Section 6 of the draft of ordinance provides that the new ordinance so far as it conflicts with or varies from the Chicago Telephone Company's ordinance of November 6, 1907, as amended shall be amendatory thereof, but in all other respects said ordinance of November 6, 1907, as amended, shall continue in force.

Section 7 provides that the ordinance shall be accepted by the Chicago Telephone Company within thirty (30) days after its passage and shall not be in force and effect until it is so accepted.

Yours respectfully,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MARCH 25, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Replying to your request as to the extent of your authority to prevent habitual signers of bail bonds at the different stations from continuing the work, I beg to advise you.

The power of admitting to bail is primarily in the Judges of the Municipal Court. The only power in persons other than of the court is conferred by the statute creating the Municipal Court.

“* * * and in case of the arrest of any person for any *quasi* criminal offense, or for any offense when the punishment is by fine or imprisonment otherwise than in the penitentiary, the chief of police, or any captain or lieutenant or sergeant of police, of the City of Chicago, or any deputy clerk designated for that purpose by an order signed by a majority of the judges of the Municipal Court shall have power to let such person to bail. * * *”

Rules have been adopted by the judges pursuant to this statute.

Rule 24 provides:

“No chief of police, captain of police, lieutenant of police or sergeant of police shall admit to bail any person charged with any criminal offense while a judge of the Municipal Court is in attendance at a branch court in the police district where such bail is offered.”

Rule 25 provides:

“Any chief of police, captain of police, lieutenant of police or sergeant of police taking bail from any person or persons before accepting the surety offered as a bondsman shall cause such surety to fill out in writing and under oath the following blank:

(See blank hereto attached.)

You will notice that the applicant is asked whether he is surety on other bonds, which answer is under oath.

The officers of the police department in passing on applications for bail, are officers of the Municipal Court and as such are not under the jurisdiction of the Mayor.

In considering the accepting of the bondsman, the officer is permitted to exercise a certain discretion. The fact that the proposed bondsman is a professional one, may be considered by him, but I do not believe he can arbitrarily refuse to accept the bond on this ground alone, particularly if the schedule is ample. Each case must be judged by its own facts.

Since the members of the police department in these matters are acting as officers of the Municipal Court, the judges of that court might object to any instructions emanating from anyone but themselves.

I respectfully offer either of the following suggestions: that the police department be notified to give greater consideration to the fact that the proposed bondsman is a professional, or has received reimbursement, or that the Municipal Court be requested to adopt an amendment to its rules, so that no person may be surety on more than a certain number of bonds at one time, unless he can schedule an amount commensurate with the cumulative liability.

I would be pleased to co-operate with the Chief Justice should he so desire.

Very respectfully,

GEO. L. REKER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 29, 1913.

HON. JOHN MCWEENY, General Superintendent of Police.

Dear Sir:

In reply to your communication of March 28th, inquiring as to the status of sub-operators, we have the honor to advise you that no such position has been created by the ordinance relating to the Department of Police. While the office of operator has been created by the ordinance referred to and all persons holding the position of operator are designated as policemen, there is no such office in the Police Department as sub-operator nor have sub-operators been designated as policemen.

We have been advised by the office of the Civil Service Commission that sub-operators are not appointed as regular members of the Department of Police, but are appointed from an eligible list of operators to substitute for the regular operators in their temporary absence.

The only object of the application of sub-operators to be sworn in as policemen, we take it, is to become beneficiaries to the Police Pension Fund.

Section 3. of the Act creating the Police Pension Fund is as follows:

“§3. Whenever any person shall have been or shall hereafter be appointed and sworn either as a probationary or regular policeman, and shall have served for a period of twenty years or more in the *police department* of such city, village or town * * * said board shall order and direct that such person, after his service in such police department shall have ceased, shall be paid a yearly pension, etc.”

We are of the opinion that a sub-operator is neither a

probationary nor regular policeman within the terms of the ordinance and therefore not entitled to the benefits of the Police Pension Fund. No person should be sworn in as a policeman until appointed as a probationary or regular operator.

Respectfully submitted,
JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

MARCH 31, 1913.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

In your letter of March 20, 1913, addressed to William H. Sexton, Corporation Counsel, you request an opinion as to the right of the Chicago City Railway Company and the Calumet and South Chicago Railway Company to exact more than a five-cent fare in certain districts.

We assume that you have in mind the territory south of 63rd street which is divided into certain transfer zones under an ordinance to the Calumet and South Chicago Railway Company, dated March 30, 1908. In this ordinance under the subject of transfers, contained in Section 10 thereof, four zones are established. These zones govern the giving of transfers and the payment of fares. The four zones all lie south of 63rd street.

The ordinance of March 30, 1908, further contains a provision authorizing the Calumet and South Chicago Railway Company to enter into a "reasonable operating agreement with the Chicago City Railway Company, the terms to be agreed upon by said companies * * * whereby the Chicago City Railway Company shall be authorized and required to operate its cars in the manner and subject to the requirements in this ordinance specified, upon and over the lines of the company within the limits of the respective transfer zones herein provided for."

Apparently in pursuance with this provision, on June 29, 1908, an ordinance was passed by the City Council authorizing the Chicago City Railway Company and the Calumet and South Chicago Railway Company to enter into an operating agreement specifically set forth in said ordinance of June 29, 1908.

The first clause of this operating agreement authorized the Chicago City Railway Company to "operate the street railway system of the Calumet Company in compliance with all the terms and conditions of said ordinance of March 30, 1908." Clauses 13, 14 and 16 of the ordinance of March 30, 1908, further provide:

Clause 13:

"During the continuance of this contract transfers shall be given to and accepted from passengers using the Railway lines owned by the City Company, and the Railway lines owned by the Calumet Company, to the extent and within and for the respective transfer zones, and upon the terms and conditions specified in the said ordinance of March 30, 1908; and no liability or obligation on the part of the City Company to exchange transfers as aforesaid, except as specified in said ordinance of March 30th, 1908, shall exist or arise out of the operation of the street railway lines of the Calumet Company by the City Company."

Clause 14:

"The City Company shall have the right, and hereby agrees to establish and maintain, within the respective transfer zones in which the exchange of transfers between the City Company and the Calumet Company shall be in force and effect, as provided in said ordinance, such through routes as shall, from time to time, be provided for by the Board of Supervising Engineers, together with the representatives of the City Company as hereinabove provided in Paragraph Fifth hereof; and the City Company hereby agrees to operate its cars over such through routes in the manner and subject to the requirements in said ordinance specified. The cars necessary for operation over such through routes shall be provided by the City Company."

Clause 16:

"This agreement shall not in any way affect or modify, or be construed to affect or modify the terms

and provisions of the ordinance of the Calumet Company dated March 30th, 1908, in reference to the transfer zones specified in said ordinance, or the time within which transfers shall be exchanged within and for said respective zones; and in case this operating agreement, or anything done thereunder, shall at any time hereafter be by any court of competent jurisdiction construed to affect or modify said provisions in any way, or to create any obligation on the part of the City Company to give or accept transfers otherwise than as specified in said ordinance, than either of the parties hereto may at their election terminate this agreement upon giving thirty (30) days' notice in writing to the other party."

It is under the zone provisions contained in the ordinance of March 30, 1908, to the Calumet Company and the ordinance of June 29, 1908, authorizing the operating agreement hereinbefore mentioned, that the companies base their claim to exact more than a five-cent fare.

Section 2171 of the Chicago Code of 1911 as amended on May 20, 1912, C. P. 390, provides as follows:

"The rate of fare to be charged by any person or corporation owning, leasing, running or operating street cars or other vehicles for the conveyance of passengers on any street railway within the limits of the city for any distance within the city limits shall not exceed five cents for each passenger over twelve years of age, and three cents for each passenger over seven and under twelve years of age, for one continuous trip. * * *

Any person, corporation, syndicate, managing trustee or trustees, committee or association, owning, leasing, managing or operating street cars or other vehicles for the conveyance of passengers, on any street or elevated railway within the limits of the city, by virtue of any assignment, transfer, sale, lease, trustee or syndicate plan or agreement, or any operating agreement to or with such person, corporation, syndicate, managing trustee or trustees, committee or association from or with another person, corporation, syndicate, managing trustee or trustees, committee or association based on rights, privileges or franchises granted to and acquired by or vested in any person, corporation, syndicate, managing trustee or trustees, committee or association, pursuant to authority granted for that purpose by any statute of the state of Illinois, or by any ordinance of the city, shall be under the same obligation to issue transfer tickets to, and re-

ceive and honor transfer tickets from, passengers as such grantor or lessor would be under obligation to issue, receive and honor under the foregoing provisions of this section, if such grantor or lessor were operating street cars or other vehicles for the conveyance of passengers by virtue of such statute or ordinance without having so assigned the same."

Section 2171 as the same now appears in the Chicago Code of 1911 before it was amended was sustained in *Union Traction Company v. City of Chicago*, 199 Ill. 484, the court holding that the city was authorized to pass the ordinance under Clause 42 of Section 1 of Article V of the Cities and Villages Act which empowers cities and villages "to license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen and all others pursuing like occupations, and to prescribe their compensation."

Section 2171 as amended has likewise been under consideration by our Circuit Court in the recent elevated transfer cases. Judge Baldwin in his opinion held that the case of the *Union Traction Co. v. City of Chicago*, 199 Ill. supra, was not in point for the reason that the elevated companies are organized as commercial railroads and that the city has no power to regulate the fares of commercial railroads as distinguished from street railway corporations.

In the case under consideration there is no question that the Chicago City Railway Company is operating the system of the Calumet Company. In fact, the first clause of the operating agreement of June 29, 1908, expressly recites that the Chicago City Railways Company is authorized to "operate the street railway system of the Calumet Co. in compliance with the terms and conditions of said ordinance of March 30, 1908."

Whether or not the Chicago City Railway Company owns the property of the Calumet Co. is a more difficult question. From the facts we have been able to gather in the short time since this matter has been referred to us, we believe that the probabilities are that the interests which control the Chicago City Railway Company also control the Calumet Co.

In this connection we beg to point out that it is a sig-

nificant fact that Leonard A. Busby, the president of the Chicago City Railway Company is also president of the Calumet Co. Mr. Busby besides being a director in the Chicago City Railway Company is a director in the Calumet Co. F. D. Hoffman is both a director and secretary of both the Chicago City Railway Company and the Calumet Co. Ira M. Cobe is chairman of the Board of Directors of the Chicago City Railway Company and a director in the Calumet Company.

We also call your attention to the fact as it appears in McGraw Electric Railway Manual, that the Chicago City and Connecting Railway Company was formed in 1910 to hold securities of the Chicago City Railway Company and connecting railways serving outlying districts in the southern part of Chicago (which includes the Calumet Co.). This company owns 94.29 per cent. of the total outstanding issue of bonds of the Chicago City Railway Company and the entire issue of the Calumet Co. Ira M. Cobe is chairman of the Committee of the Chicago City and Connecting Railway Company.

The question arises whether said Section 2171 of the Chicago Code of 1911 as amended might not be considered as a provision impairing the obligation of contracts since the subject of fares is specifically treated in the special ordinance grants under which both the Chicago City Railway Company and the Calumet Company operate.

It is true that in the case of *Chicago Union Traction Company v. City of Chicago, supra*, the court has held that the provision did not impair the obligation of contracts. In that case, however, the companies claiming the right to charge more than one fare did not receive ordinance grants direct from the city. Its right to operate existed by reason of certain conveyances, leases and assignments to which the city was not a party. The court held that the right of each of the former companies to charge a five-cent fare was not transferred to the new company.

The controlling question in determining whether the enforcement of Section 2171 aforesaid would impair the obligation of contracts, is whether Section 2171 is a proper police regulation. If it is, then it may be enforced, notwithstanding

ing the fact that specific provision is made on the subject of fares in the ordinance grants to the companies.

Dillon on Municipal Corporations, 5th Ed., Vol. 3, says in Section 1269, p. 2060:

“§1269. POLICE POWER AS AFFECTING FRANCHISE RIGHTS.—Although a franchise or privilege to use the city streets is, when accepted and acted upon, a contract which cannot be impaired as well as a vested property right which cannot be taken except by the power of eminent domain, these franchises and privileges are not exempt from the exercise of the police power of the State either operating directly by legislative enactment or by delegation to the municipality. It is a general rule that the *right to exercise the police power cannot be alienated, surrendered, or abridged*, either by the legislature or by the municipality acting under legislative authority, by any grant, contract, or delegation, because it constitutes the exercise of a governmental function without which the state would become powerless to protect the public welfare. Hence, when a franchise or privilege is granted to use the city streets for a public service, the grantee accepts the right upon the *implied condition that it shall be held subject to the reasonable and necessary exercise of the police powers* of the state, operating either through legislative enactment or municipal action.”

In the same volume Dillon says, in Section 1270, page 2063:

“§1270. POLICE POWER; REASONABLE REGULATIONS.—The basis of the exercise of the police power is the protection of human life and the promotion of public convenience and welfare. Municipal regulations not having a fair relation to these objects are unreasonable, but when they fairly tend to promote these objects they are generally sustained.”

In *Northern Pacific Railway Company v. Duluth*, 208 U. S., the court says, at page 596:

“There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment

of the obligation of contracts. In *New York & New England Railroad Company v. Bristol*, 151 U. S. 556, 576, the doctrine was thus laid down by Chief Justice Fuller, speaking for the court."

Our own court, in *City of Chicago v. Union Traction Company*, 199 Ill. 259, summarizes the police power of the city as follows:

"The city, as the representative of the State, is invested with power to enact and enforce all ordinances necessary to prescribe regulations and restrictions needful for the preservation of the health, safety and comfort of the people. The exercise of this power affects the public and becomes a duty, the performance whereof is obligatory on the city. The city could not, by the terms and conditions of the former ordinance, deprive itself of this power or relieve itself of this duty, nor could the defendant in error company, by any contractual terms of an ordinance, exempt itself from the proper and reasonable control of the municipal authorities in matters affecting the health, safety or comfort of the people. 'No contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public. This is especially true of the police power, for it is incapable of alienation. It cannot be doubted that a company which secures the right to use the streets of a municipal corporation takes it subject to the police power resident in the State as an inalienable attribute of sovereignty.' "

The trend of judicial decisions seems to indicate without question that the regulation of fares to be charged by street railway corporations is a proper police regulation, as noted by the following:

Booth on Street Railways says, in Section 232, page 378:

"It was said that when the owner of property devotes it to a use in which the public has an interest, he must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use; and that the limitation by legislative enactment of the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, establishes no new principle in the law, but only gives a new effect to an old one. In accordance with these elementary principles, it was decided that a statute passed by the general assembly of Illinois, fixing

the maximum charge for storage and handling grain by warehousemen, was not repugnant to the constitution of the United States. The general doctrine announced in that case has been adopted and followed in a large number of railroad cases, in which it has been held that a regulation limiting charges does not amount to a taking of property in violation of law."

In *Union Traction Company v. City of Chicago*, 199 Ill. *supra*, the court said at page 522:

"It necessarily follows that those whose business it is to propel street railway cars along the iron tracks laid in the public streets of a city, are engaged in the business of carrying passengers for hire, and that their occupation is of a like nature with the occupation of hackmen, omnibus drivers and cabmen, whose business also is the carriage of passengers for hire. The general doctrine is that the legislature has power to regulate the charges of common carriers. (*Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., Railroad Co. v. Iowa*, *id.* 155; *Ruggles v. People*, 91 Ill. 256; *Ruggles v. Illinois*, 108 U. S. 526.) The legislature, having such power, can confer it upon the common council of the city. In other words, the municipality may exercise the power by delegation from the State. (*Rogers Park Water Co. v. Fergus*, 178 Ill. 571; *City of Danville v. Danville Water Co.*, 180 *id.* 235; *Dean v. Chicago General Railway Co.*, 64 Ill. App. 155; *Chicago Packing Co. v. City of Chicago*, 88 Ill. 225.)"

In *Joyce v. City of East St. Louis*, 77 Ill. 156, the court, at page 158, said:

"In respect to such vehicles as those used for hire by hackmen and draymen, and the like, it is customary with municipal authorities to regulate and fix the rate of carriage. It is ordinary police regulation, to protect the public against extortion and imposition on the part of those engaged in the business of common carriers for hire. One using a vehicle not for hire, but only in the course of his ordinary private business, does not come within the reason or necessity of any such municipal regulation. The provision of the charter as to prescribing the rates of carriage can reasonably apply only to such vehicles as are used for hire."

In *Frankford, etc., Railway Company v. City of Philadelphia*, 58 Pa. St. 119, at page 124, the court says:

“This act is still in force. It plainly authorizes regulation by the issue of licenses. *And we are of the opinion that it applies to passenger railway cars. They are omnibuses, or if not, they are vehicles in the nature of omnibuses.* They are open to all, intended for all. *The change of form from that of anything known when the Act of Assembly was passed, is not a change of the nature of the vehicle.* In one city, as, at least, of Europe, large vehicles intended for indiscriminate public use, run sometimes upon a railway track, and at other times upon a common pavement. Nobody can doubt they are omnibuses. *The form of wheels, or the character of the roadway over which a vehicle runs, does not determine its nature so much as do the uses to which it is put, and for which it was designed.* We hold then that the ordinance of January 2, 1867, is valid as a police regulation, there being nothing to show that it is unreasonable. It follows that the plaintiffs were not entitled to a judgment on the case stated.”

In *Farwell v. City*, 71 Ill. 269, the court said, at page 272:

“The spirit of the ordinance is, to bring the class of carriers therein named under the police regulations of the city. It is designated to operate upon those who hold themselves out as common carriers in the city for hire, and to so regulate them as to prevent extortion, imposition and wrong to strangers and others compelled to employ them, in having their property or persons carried from one part of the city to another. This is a rightful exercise of the police power. *Cooley Const. Lim.* 201. And it is a power that has, so far as our researches have extended, not been questioned. Were it not exercised, strangers visiting or passing through the city would be at the mercy of unscrupulous and irresponsible persons plying such business.”

The best expression on the subject of rate regulation in Illinois is found in the case of *Rogers Park v. Fergus*, 178 Ill. 578.

“The power possessed by the State to enforce the duty might be properly exercised by establishing a scale of rates and prices to be demanded by the company from the inhabitants of the village, and this power, and that mode of exercising it, were delegated by the State to the village by Section 1, Article 10, Chapter 24 of our statutes. (*Starr & Curtis' Stat.* 1896, p. 785.) The village exercised the power by incorporating in the ordinance

a scale of prices as being just and reasonable maximum rates to be paid to the company by the consumer of water. This provision of the ordinance had no effect to establish a contract between the appellant company and the village that the individual inhabitants of the village should and would pay such rates for the period of thirty years, or any fixed period of time, but was simply a declaration on the part of the village that such rates were reasonable. The legal effect was to establish, *prima facie*, the corporation, in order to discharge the duty it owed to the public, must supply the commodity it has been created to supply at the prices named in the ordinance. It was a mode of regulating and enforcing the discharge of a legal duty—not a proposition looking toward a contract. No contract was necessary to create an obligation on the part of the corporation to supply water at a reasonable rate, for that rested upon it as a duty.

Nor did the fixing of rates by the alleged ordinance of the Village of Rogers Park vest in the appellant company an irrevocable right to exact such rates for the period it has been granted permission to occupy the streets, alleys and public places of the village, or for any fixed period. A rate or price reasonable and just when fixed may, in the future, become so unreasonably high that the exaction of such rate or price is but an extortion. The duty of the corporation does not, however, change, but remains the same—that is, to exact only reasonable compensation. The power of the state to enforce that duty is not exhausted by its exercise in the first or any subsequent instance, but is continuous and may be exerted from time to time, whenever necessary to prevent extortion by the agency created by the State to serve the public. Whenever the evil of extortion exists the power to eradicate it may be successfully invoked. In the exercise of that power by the State, or by a municipality exercising the power by delegation from the State, there is no admixture whatever of any contractual element, nor does the corporation against whom the power is exercised obtain any vested property interest or property right in the scale of rates deemed at any particular time to be reasonable maximum prices for the article to be supplied by the corporation.” The foregoing case was sustained in 180 U. S. 624.

The deduction to be drawn from the foregoing is that the legislature intended that municipalities might pass ordinances

to prevent fraud and extortion being employed by common carriers, and that it was the intention of the legislature to permit municipalities to protect the public. We believe that ample authority is given to municipalities to make reasonable regulations governing the rates of fare to be charged by street railway corporations, and that such regulations can be sustained under the police power of the city.

The fact that the city has by ordinance contracted with the companies to permit a certain charge, can have no application or alter the situation. The city at all times retains the right to make reasonable regulations concerning the subject of fares.

Under the line of decisions herein referred to the city cannot contract away its police powers.

What is a reasonable rate is ultimately a question for the courts to determine. Until the courts declare, however, that the rate of fare provided in Section 2171 as amended in the particular matter under consideration is unreasonable, such rate is controlling.

We are of the opinion that the Chicago City Railways Company and the Calumet and South Chicago Railway Company have no authority to exact more than a five-cent fare on any of their respective lines of street railway within the limits of the city, and that both companies aforesaid are under legal obligation to issue and receive transfers as between themselves upon the payment of a five-cent fare within the limits of the city.

We do not desire to be understood as passing upon the question as to the right of the aforesaid companies to exact more than a five-cent fare on Through Routes 4 and 5. The provisions relating to Through Routes 4 and 5 are contained in an ordinance passed by the City Council on July 15, 1912, C. P. 1370, which date as you will observe, is about

two months later than the date of the passage of Section 2171 as amended.

Respectfully submitted,
JOHN W. BECKWITH,
MAX M. KORSHAK,
Assistants Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

MARCH 31, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have before me a communication transmitted to this department by you from Mr. Bion J. Arnold, Chairman of the Board of Supervising Engineers, in which Mr. Arnold requests your opinion and that of the Corporation Counsel as to whether the Board of Supervising Engineers would approve the expenditure by the Chicago City Railway Company of a one thousand dollar contribution toward the flood sufferers' fund in Ohio and Indiana as a proper charge to the joint account of the Chicago City Railway Company and the City of Chicago under the terms of the 1907 ordinances.

Mr. Arnold personally takes the view that he "was compelled to tell the company that I saw no authority for making this contribution under the terms of the ordinances and that the only way that it could be done would be for the company to make a contribution out of its own fund." With this conclusion I fully agree.

Section 25 of an ordinance of February 11, 1907, to the Chicago Railways Company provides in detail as to the amounts which should be deducted from the gross receipts of the street railways system. These items are briefly: (1) Expenses of operation; (2) amounts contributed under Section 16 (immediate rehabilitation expenditures and 6 per cent. gross receipts for maintenance and 8 per cent. of said receipts for renewals) together with expenditures for personal injury claims; (3) taxes and assessments; (4) salaries and expenses

of Board of Supervising Engineers; (5) 5 per cent. T. V. C. valuation plus capital addition of 1907.

After the foregoing amounts have been deducted from the gross receipts, provision is made for a division of the remaining net receipts, 45 per cent. whereof is to be retained by the company and 55 per cent. is to be paid by the company to the city.

The only deductions with the exception of license fees exacted by the city from the company or its employes, which are permitted to be made under the ordinance, are certain commutations of the present rates of fare into lower ones. As this last mentioned situation has never arisen it need not here be discussed.

There is nothing in this ordinance (and the provisions of the Chicago City Railway Company ordinance are virtually identical) which makes any provision for any such donation as is proposed by the railway company. On the contrary, by a familiar canon of construction the expression of the various items of expenditure excludes expenditure for other purposes not enumerated.

The expenditure of this amount and its charge to the joint account of the company and the city would necessarily reduce the city's 55 per cent. and would be tantamount to taking a specified sum out of the 55 per cent. (divisible net receipts).

The courts of this state have decided that the fund resulting from the 55 per cent. of the net receipts of the railway company constitutes a traction fund, whose appropriate and possibly only use is to provide new, better or additional means of transportation within the City of Chicago.

The project of relieving the sufferers from floods in Ohio and Indiana, while undoubtedly of the most worthy and humane character, is not one having the remotest connection with the purposes for which the traction fund was established or is now being maintained.

Even though the traction fund were not hedged around with safeguards of the character hereinabove referred to as a general corporate fund of the city, it could not be diverted in the manner suggested, for the reason that the courts have

repeatedly held that public moneys cannot be donated for any purposes whatsoever. Public moneys must be expended in accordance with appropriations for their use and in no other way.

I am, therefore, of the opinion that neither under the 1907 traction ordinances nor under the general law can donations of the character referred to be approved by the Board of Supervising Engineers so far as such expenditures involve charging such amounts to the joint account of the city and company. It may be superfluous to add that I concur in Mr. Arnold's observation concluding that there can be no possible objection to the companies making a contribution out of its own funds, viz. its 45 per cent of the divisible net receipts.

Very respectfully,

JOHN W. BECKWITH,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MARCH 31, 1913.

HON. RAY PALMER, City Electrician.

Dear Sir:

You referred to this department a clipping from a newspaper in which it is stated that the attorney general of the state had ruled that the legislature can delegate to a commission the duty of determining what character of construction would best carry out the provisions of the law relating to electrical equipment. The clipping then goes on to state that the commission, having this power, could adopt the electrical code prepared by the underwriters, and in this way the code would thereupon become binding.

In calling attention to this newspaper item you asked to be informed, first, whether the legislature had the power to delegate to a commission the authority to adopt a certain set of rules governing electrical construction as standard, and next, whether, under the provision of the proposed ordinance requiring the city electrician to inspect electrical installations and determine whether the same have been installed in a "safe

and secure manner," he can adopt a code such as the one mentioned in the clipping referred to and enforce same. In other words, your question is whether the city electrician can issue a printed book of rules and insist on all work to be installed complying with such rules before he approved same as being done in a "safe and secure manner."

Your inquiry is no doubt due to the fact that in some respects it may have been found impracticable to prescribe all the details of electrical construction by ordinance and to keep pace with electrical development. This may result in a great deal of inconvenience and even faulty construction, but it cannot be overcome by the enactment of an ordinance which will permit you to fix on the methods of construction, changing them as may be necessary from time to time.

The question of how far a delegation of authority on the part of the legislature or city council will be held constitutional opens up a large field, and no definite conclusion can be arrived at which would finally determine the exact extent of such authority which may be conferred on you. The line of demarkation between a delegated legislative power and a discretionary power is not clear, and has been the subject of many conflicting decisions of the courts of last resort. In spite of the statement contained in the newspaper item we do not think that a general delegation of power to a board, constituted in the manner that it is proposed to form the state building commission, would carry with it any such broad power to enact a code and enforce same as the language in the clipping referred to indicates can be assumed.

People v. Election Commissioners, 221 Ill. 19.

The general rule is that no power to legislate can be delegated to such a board, or to any public officer, and that such establishment and enforcement of rules must be based on some discretionary power rather than on any legislative or judicial power. Hence, the law must in the first instance explicitly state what must be done, although as to the manner of doing it, a large discretion may be vested in some board or officer.

The following is a good statement of the rule we are seeking to define:

“The true distinction is between a delegation of power to make the law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no objection can be made.”

Sutherland on Statutory Construction, Section 68.

In applying the law thus defined, the courts have at times, as stated above, drawn some very fine distinctions which cannot always be reconciled. But while they have been very indulgent in some cases, it is quite clear that they will not sanction such a step as you propose.

In the case of *Maxwell v. State*, 40 Md. 273, it was held that an act providing that the “rules and regulations, forms and blanks, prescribed and adopted by the comptroller,” as set forth in one of the sections of the act, “shall have the same force and effect in law as if they were herein enacted,” was void, as being an unconstitutional delegation of legislative authority.

Our Supreme Court in one case held that although the legislature had power to regulate the dispensing of domestic and proprietary medicines, in the interest of public health, the Pharmacy Act of 1897 was invalid, as an unwarranted delegation of the legislature’s power to the board of pharmacy, which was given sole discretion in its exercise.

Noel v. People, 187 Ill. 587.

In other cases the court has gone very far in upholding a broad discretionary power. Among these is the case of *Arms v. Ayer*, 192 Ill. 601, where it approved an act authorizing the inspector of factories to determine how many, and in what position, fire-escapes shall be placed, the material to be used, the construction of same, etc.

But while a broad discretionary power has frequently been upheld, the decisions are all consistent in holding that the legislative act must furnish the basis or guide for a rule of action before the discretionary power can come into play. In other words, there must be some specific requirements before it can be said that any administrative officer has any discretion concerning their fulfillment.

Freund on Police Power, Section 496.

All the authorities in this state follow the rule announced in *People v. Reynolds*, 5 Gilm., 1, a very early case which laid down the principle that has never been departed from. That principle is, in effect, that a legislative body may authorize others to do those things which it might properly, yet cannot understandingly, or advantageously, do itself.

Spiegler v. City of Chicago, 216 Ill. 114.

People, etc., v. Grand Trunk W. Ry. Co., 232 Ill. 292.

Block v. City of Chicago, 239 Ill. 263.

This doctrine is relied on even in the fire-escape case mentioned above, which upholds a discretionary power of the most extreme kind.

"In *People v. Reynolds*, 5 Gilm., 1, it was held that to establish the principle that whatever the legislature may do it shall do in every detail or else it shall go undone, would be almost to destroy the government. It is there said (p. 13): 'Necessarily, regarding many things, especially affecting local or individual interests, the legislature may act either mediately or immediately. We see, then, that while the legislature may not divest itself of its proper functions or delegate its general legislative authority, it may still authorize others to do those things which it might properly yet cannot understandingly or advantageously do itself. Without this power legislation would become oppressive and yet imbecile.' "

Arms v. Ayer, 192 Ill. 601-611.

It will be seen, therefore, that any law which seeks to place into the hands of a board or an administrative officer the power to adopt a code or set of rules that must be followed by the public would undoubtedly be held invalid. There would have to be enough in the law to indicate what must be done, and, in a general way, the manner of doing it. To vest authority to control construction completely in the hands of an executive officer would constitute an invalid delegation of power.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 31, 1913.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Application was made on July 29, 1912, by Harrison B. Riley, then the holder of the record title of certain lands along the Calumet River, for a permit to build a dock in the vicinity of 98th street and said river. The real owner of these lands is the Commonwealth Edison Company and the title has since been conveyed to said company.

The W. H. Merritt Company, which owns a tract of land and elevator to the north of proposed dock, on August 14, 1912, addressed a letter to the building department in which, after referring to Mr. Riley's application for a permit to construct a dock, it says:

"We were informed that this could not be done without the consent of the adjoining property owners, and this has not been given by us.

"If this dock is constructed in the manner they contemplate, according to our information, it will absolutely put us out of business and make our elevator useless, as it would be impossible for us to load any boats which form the larger part of our business."

Mr. Riley's application was referred to Mr. Nicholas Michels, of this department, who, on September 24, 1912, wrote an opinion in which he says:

"I am of the opinion that said permit may be issued subject to the following condition:

"That this permission is not to be construed as authorizing the invasion or infringement of the legal rights of any person or corporation private or municipal nor as exempting said grantee from liability for any damages that may result from the works herein and hereby authorized." "

Pursuant to said application and the opinion rendered by Mr. Michels, dock permit No. 1230 was issued October 4, 1912, to Harrison B. Riley to construct four hundred (400) feet of dock along the harbor front at the place designated in the application, twenty-seven (27) feet back from the new channel line of the Calumet River, as established by the United States Government.

It appears that Colonel Ricard O'S. Burke, Assistant Engineer of Rivers and Harbor Division, in making up the permit required the additional width of twenty-seven (27) feet between the new United States channel line and the shore or dock line, and as authority for requiring such additional width relied upon the case of *Cummings v. The City of Chicago*, 188 U. S. 410.

The Commonwealth-Edison Company, the real owner, refused to accept the permit with the above requirement of twenty-seven (27) feet additional width of channel and renewed its application for a permit to build a dock a portion of which it desired to place along and upon the new United States channel line.

Mr. William H. Arthur, attorney for the Commonwealth-Edison Company called at this department a number of times in regard to the matter and took issue with the construction placed upon the Cummings case by Colonel Burke, and maintained that the language of that case contemplated that the proper place for a dock is along the channel and dock lines laid out under the authority of the Act of Congress referred to in the case and further contended that there is no rule requiring docks to be built landward from the United States channel.

By inspection of the linen tracing hereto attached, it appears that the dock to be built and described in dock permit No. 1230 is indicated on tracing by broken red line marked "A-B-C." That portion indicated by "A-B-C" while not exactly, is practically at right angles to the new United States channel and only the portion indicated by "C-D" is parallel thereto. Further, the portion indicated "A-B-C" is in the central area of the old river channel and this area is indicated on the tracing as a water area. As there shown it readily appears that the same could be used as a turning basin, and while soundings or depths are not indicated upon the plat and were not furnished by the applicant or by the Rivers and Harbor Division, the communication of the W. H. Merritt Company clearly indicates that this basin is navigable and is used for commercial purposes.

The lengths of the proposed dock are not indicated, but

I have been informed by Colonel Burke that the portion designated "A-B-C" and a part of that portion from "C" to "D" and which lies in the central area of the said basin, constitutes the four hundred (400) feet of dock for which permit No. 1230 was issued.

Mr. Arthur, in connection with the second application for a permit, submitted to this department a title guaranty policy including the land in question issued to the Commonwealth-Edison Company by the Chicago Title and Trust Company. This land is embraced in the second description in Schedule "A" of said policy. The description includes Block 1 of Bowen's Addition with a certain small exception, not here in question, and all those portions of Blocks 2 and 18 in said addition which lies east of the center channel line of the Calumet River, as accepted and established by the United States Government, "excepting therefrom so much of said premises as is described as follows:

Commencing at the intersection of the east channel line of the Calumet river as accepted and established as aforesaid with the north line of said section 7; running thence southeasterly along the said channel line one hundred sixty-seven and eighty-six one hundredths (167.86) feet; running thence northeasterly in a straight line two hundred eighty-three (283) feet more or less to a point on the north line of said section 7 two hundred ninety-one and one-half ($291\frac{1}{2}$) feet east of the place of beginning; and running thence west along the north line of said section 7 two hundred ninety-one and one-half ($291\frac{1}{2}$) feet to the place of beginning."

I have indicated in lead pencil on the sketch plat in indelible ink the land included in the above exception and marked the same with the letter "X." The excepted tract is in the water area at the junction of the old river channel with the new United States channel and borders upon that portion of the dock proposed to be located near the center of the basin and which is objected to by the W. H. Merritt Company. This excepted triangular tract was conveyed to Harrison B. Riley by E. A. Shedd and Chas. B. Shedd by quitclaim deed, and why the title to the same was not guaranteed

by the Chicago Title and Trust Company, I am not informed; but from an examination of the plats and blue prints hereto attached and from the maps as above set forth, I am led to believe that the general public and shore owners, such as W. H. Merritt Company, have rights of navigation in this water area, and, possibly, certain riparian rights.

Schedule "B" of said guaranty policy also contains the following reservations:

"Showing estates or defects in title and liens, charges and incumbrances thereon which do or may now exist and against which the company does not guarantee.

5. Dock line twenty-five (25) feet east of the east line of the Calumet river as established by the United States government.

6. Rights of the United States of America and the public in and in connection with so much of said premises as lies within the east half of the Calumet river as established and accepted as aforesaid."

I have caused an examination to be made of the records in the recorder's office with reference to the location of the new channel and the abandonment of the old channel and I find that at this particular point the United States government acquired from E. A. Shedd and Charles B. Shedd an easement from the new two hundred (200) foot channel, but have been unable to find any recorded instrument or any proceeding whereby the navigable waters of the old channel have been abandoned by the United States government, the riparian owners or the public generally.

In the early part of February, 1913, after submitting the aforesaid guaranty policy, Mr. Arthur called at this department to further take up the second application for a permit, and he, the Corporation Counsel, and the writer, called upon you at your office in conference upon the matter. Col. Burke also was present. At the close of the conference you gave instructions to Col. Burke to furnish the necessary maps and other data to this office from which to draw up a general ordinance to be presented to the City Council fixing the dock and harbor lines in the Calumet River so as to coincide with the two hundred (200) foot channel line as es-

tablished by the United States government. To date said maps and data have not been received.

I come now to the consideration of the principles laid down in the case of *Cummings v. Chicago*, 188 U.S. 410. The controlling question in the case was whether the plaintiffs had the right by virtue of certain action of the Secretary of War to proceed with the construction of a dock in the Calumet River along the United States channel line in disregard of an ordinance of the City of Chicago requiring the permission of its Department of Public Works as a condition precedent to the construction of any dock within the limits of the city. Since Mr. Arthur does not agree with Colonel Burke's construction of this case, I beg leave to quote from the opinion at large as follows:

"In a sense, but only in a limited sense, the United States has taken possession of Calumet River, by improving it, by causing it to be surveyed, and by establishing lines beyond which no dock or other structure shall be erected in the river without the approval or consent of the Secretary of War, to whom has been committed the determination of such questions. But Congress has not passed any act under which parties, having simply the consent of the Secretary, may erect structures in Calumet River without reference to the wishes of the State of Illinois on the subject. We say the State of Illinois, because it must be assumed, under the allegations of the bill, that the ordinances of the City of Chicago making the approval of its Department of Public Works a condition precedent to the right of any one to erect structures in navigable waters within its limits, are consistent with the constitution and laws of that state and were passed under authority conferred on the city by the state.

Calumet River, it must be remembered, is entirely within the limits of Illinois, and the authority of the State over it is plenary, subject only to such action as Congress may take in the execution of its power under the Constitution to regulate commerce among the several states. That authority has been exercised by the state ever since it was admitted into the Union upon an equal footing with the original states."

"* * * 'But until Congress acts on the subject, the power of the State over bridges across its navigable

streams is plenary. This doctrine has been recognized from the earliest period, and approved in repeated cases, the most notable of which are *Willson v. The Blackbird Creek Marsh Co.*, 2 Pet. 245, decided in 1829, and *Gilman v. Philadelphia*, 3 Wall. 713, decided in 1865.”

“Did Congress, in the execution of its power under the Constitution to regulate interstate commerce, intend by the legislation in question to supersede, for every purpose, the authority of Illinois over the erection of structures in navigable waters wholly within its limits? Did it intend to declare that the wishes of Illinois in respect of structures to be erected in such waters need not be regarded, and that the assent of the Secretary of War, proceeding under the above acts of Congress, was alone sufficient to authorize such structures?”

“It is only necessary to say that the act of 1890 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the states. The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a state, depend upon the concurrent or joint assent of both the National Government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the state acting by its constituted agencies.”

In *Escanaba Company v. Chicago*, 107 U. S. 678, 683, the court says that the police power of the states embraces the construction of roads, canals and bridges and the establishment of ferries and it can be generally exercised more wisely by the states than by a distant authority and applying this doctrine to docks in the *Cummings* case says that the Act of Congress reasonably interpreted makes the erection of a structure in a navigable river within the limits of a state dependent upon the concurrent or joint assent of both the National government and the state government. In this instance the City of Chicago represents the state government.

It is admitted that there is not at present any ordinance

establishing dock lines in the Calumet River, and that there is no established rule in reference thereto, and Mr. Arthur has contended that the city must establish its dock lines so as to coincide with the channel lines established by the United States government.

This position can hardly be accepted as correct, for if the City of Chicago has full power to regulate these matters in conjunction with the National government as set forth in the Cummings case, then it certainly must have power to make such a rule or pass such an ordinance; and to say that it must establish its dock lines where the United States government has established its channel lines, would be to completely deny the existence of any power in the City of Chicago to regulate such matters. In other words, if, upon application made by a shore owner to build a dock, the city *must* grant permission to place that dock along the United States channel line, if the applicant so desires, notwithstanding the fact that there may be navigable waters between said channel line and the land, then the city would have no power in the premises and the law as adjudged in the Cummings case would be completely nullified and ignored.

To my mind, Sections 1125 and 1129 inclusive, of The Chicago Code of 1911 clearly confer such power and jurisdiction on the Commissioner of Public Works and the fact that no dock line has been established by ordinance or that no general rule for establishing such lines is known to exist in the administration of said department does not in the least detract from the power and discretion reposed in the Commissioner of Public Works by said sections of The Code.

Section 1125 provides that every owner, etc., shall at all times keep the wharves and docks in good repair and safe condition and provides a penalty for failure to do so.

Section 1126 makes it the duty of the Harbor Master to require all persons engaged in repairing or constructing any dock "to produce a permit from the Department of Public Works, which permit shall specify the character and *location* of such repairing, renewal, alteration, or *construction*" and

provides a penalty for failure so to do. This section further provides that "in the event of any such dock having been repaired, renewed, altered or constructed *in or upon the water area of the harbor of the city*, the person thus convicted of a violation of this section, in addition to the fine hereinbefore specified, shall be required at once and at his own expense or cost to remove such dock back to its former location * * *."

Section 1127 provides for the issuance of a written permit and upon the requirements being complied with, directs the Commissioner to issue such permit "unless it shall appear that the work desired to be done will result in unduly obstructing the harbor or in endangering the safety of any dock, pier, breakwater or any structure located upon or along the harbor" and provides appropriate penalty for violation of said section, and in Section 1097 the Calumet River and all slips connecting therewith are included in the harbor of the City of Chicago.

It certainly is clear without further argument or demonstration that if the water area at the junction of the old river channel and the new United States channel near 98th street is navigable, it constitutes a portion of the harbor of Chicago and should not be obstructed by structures of any kind, and even if this water area is not navigable but has been increased by gradual erosions, or if some of the original water area has been filled in but not brought above the surface of the water, the city would have the right to dredge out the same to a navigable depth.

Section 1128 makes it the duty of the harbor master to report "*any and all encroachments upon the harbor lines*" as now or hereafter established and provides appropriate penalties for violation thereof.

It is my opinion that the proper view of the joint assent referred to in the Cummings case is this that the Secretary of War will not issue a permit to an applicant to build a structure in the main channel of the Calumet River beyond the channel lines established by the United States, but only up to those lines, and that the Commissioner of Public

Works being here on the ground is the local official who is in a better position than any distant authority to judge of present requirements and future needs and has the right and power, under the ordinances, to determine, as a question of fact, whether or not a dock should be placed farther back from the center of the channel than the United States channel lines provided there is water area between said United States channel lines and the shore.

The United States channel lines were established by Act of Congress and the Secretary of War is governed thereby and if the Commissioner of Public Works should desire a general expression of policy upon the subject, it would be proper for him to refer the matter to the City Council. However, if he so desires, I am of the opinion that he has ample authority under present ordinances to decide the questions at issue in the present application.

Summarizing the foregoing, I am of the opinion,

First. That any permit issued herein should contain a provision as suggested by Mr. Michels that such permit is not to be construed as authorizing the invasion or infringement of the legal rights of any person or corporation, private or municipal, nor as exempting said grantee from liability for any damages that may result from the works authorized;

Second. That the Commissioner of Public Works should determine whether docks located as desired by the applicant would constitute an obstruction in the harbor of the City of Chicago and thereby interfere with commerce or navigation on the Calumet River;

Third. That the Commissioner of Public Works is clothed with ample power to act in the premises and that he is not necessarily bound to establish dock lines along the two hundred (200) foot channel lines established by the United States government.

Fourth. That the applicant, if permit is issued, be required to hold the City of Chicago harmless against all claims for damages of any character, whatsoever, arising at any time because of the issuance of the permit or because of any matter connected with any work covered by it.

I hand you herewith, linen tracing showing the location of the dock to be built, also indelible ink tracing showing location of dock to be built and the triangular submerged area indicated by the letter "X", the title to which is not guaranteed; blue print furnished by the Commonwealth-Edison Company, the opinion of Nicholas Michels, dated September 2, 1912, the letter of W. H. Merritt Company, dated August 14, 1912, copy of letter to Harrison B. Riley, dated July 2, 1912, copy of letter of Ricard O'S. Burke, dated July 3, 1912, copy of letter of Harrison B. Riley, dated July 23, 1912, copy of letters of Ricard O'S. Burke, dated July 24, 1912, and November 13, 1912, letter of transmittal by Ricard O'S. Burke, dated September 20, 1912, and application for permit dated July 29, 1912.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 31, 1913.

HON. RAY PALMER, City Electrician.

Dear Sir:

We have your communication of March 10, 1913, in regard to the above subject matter. Since the receipt of your communication we have conferred with Mr. Wilcox, the City Gas Inspector, and were advised that the Peoples Gas Light and Coke Company lays service pipes to lots containing buildings and connects the same with its mains without cost to the applicants; that the Gas Company has been charging the City of Chicago with the cost of laying service pipes and connecting its mains therewith for the purpose of furnishing a supply of gas for lighting the streets. The question arises as to whether the Gas Company has a legal right to make such charge to the City of Chicago.

The general rule is stated by Dillon in his work on Municipal Corporations, (Fifth Edition) Volume III, Section 1317, as follows:

“So far as the consumption of water or light is concerned, it is immaterial to the consumer whether the supply be furnished by the municipality or by a public service corporation. As a general rule the obligations to the consumer are the same in either case. The organization supplying water or light whether it be a municipal or a private corporation, is under a *duty to consumers to supply the water or light impartially to all reasonably within the reach of its pipes, mains, and wires.*”

In requiring the city to pay the cost of laying a service pipe the Gas Company is not, however, in our opinion, discriminating between one consumer, *i. e.*, the City of Chicago, and other consumers similarly situated. When the Company connects its mains with a building by means of a service pipe, it has a reasonable expectation of furnishing a sufficient quantity of gas at that particular place in the future to recompense it for the cost of making the connections, whereas, in the case of the application of the City of Chicago for street lighting, the structures are of such temporary nature that the Gas Company might reasonably require compliance with reasonable rules and regulations not applicable to permanent places of abode.

In the case of the *Public Service Corporation v. The American Lighting Company*, 67 N. J. Eq. Rep. 122, the court says at page 131:

“But the defendant goes further and asserts and argues that when called upon to furnish gas by quantity it is the duty of the complainants to furnish and maintain their own meters.

Let us look at that proposition for a moment.

Admitting such to be the general rule, let us inquire whether it does not still, in the present case, contain the element of unreasonableness. Must not the demand for measured gas be reasonable? To illustrate: Suppose a person should rent for the three summer months a vacant lot in Jersey City, and facing on a street in which complainants had a gas main, and should place thereon a tent, or erect a rough-board shanty, and then should demand of the gas company to excavate the earth and lay down a service pipe leading to the tent or shanty, and place a meter to supply the same, all at its own expense. Would anybody say that such demand was reasonable? Would the obligation of complainants, arising out of their ex-

ercise of a public franchise, extend so far as to compel them to excavate the earth and lay down a gas supply-pipe to that tent or shanty, place therein a meter, without proper protection, for the purpose of supplying gas for three months to such a tenant, who might, after all, not use any gas? * * *

In short, is not the obligation to supply a dwelling or tenement with gas, and for that purpose to lay down a supply-pipe and set a meter, subject to the limitation that there shall exist a reasonable expectation that the consumption of gas shall be sufficient to warrant the necessary preliminary expenditure?

I think there can be but one answer to these questions."

The question as to whether the Gas Company is obliged to provide service pipes so that a consumer may be furnished with a supply of gas *in any event* is not, however, free from doubt.

In *Prindiville v. Jackson*, 79 Ill. 337, it was held that a regulation of a board of public works of a city, which requires citizens desiring to use the water of the city flowing through the main pipes, to lay down at their own expense necessary service pipes from their lots to the main pipes, is but just and reasonable and in accordance with the principle upon which special assessments on account of special benefits are founded.

This view is supported by the following cases:

Jackson v. City of Ellendale, 4 N. D. 478.

Gleason v. Waukesha County, 103 Wis. 225.

On the other hand, in *Bothwell v. Consumers Company, Ltd.*, 13 Idaho 568, it was held that all mains and laterals of a water system within the franchise limit belong to the company owning the franchise, and it is the duty of the company to construct the same at its own expense and connect with the pipes of the property owner at the line of his property and the limit of its franchise.

See also the following cases to the same effect:

Pocatello Water Co. v. Standley, 7 Idaho 155.

Portland Natural Gas & Oil Co. v. State, 135 Ind. 54.

State v. Consumers Gas Trust Co., 157 Ind. 345.

Indiana Natural Gas & Oil Co. v. State, 162 Ind. 690.

We are inclined to believe, however, that the obligation of a water or gas company to provide service pipes depends upon the charter or franchise of the company. In the *Prindiville* case, *supra*, the water system was installed by the City of Chicago and treated as a public improvement paid for by taxation, and the service pipes were held to be a special benefit to the property owner, for which he was obliged to pay. It was conceded in that case that the property owner had a right to lay down his own service pipes and to connect them with the main water pipe of the city (see page 340.)

The Gas Company, as a private corporation, was given the power by its charter "to manufacture and sell gas * * * to be used for the purpose of lighting the City of Chicago, any streets, buildings, manufactories, public places or houses therein contained, and to erect and use all necessary works and apparatus for such purposes aforesaid, with the consent of the common council of said city, to lay down and use all necessary pipes for the conducting of gas in and along any of the streets, alleys, avenues, or public squares of said city, etc." Having accepted the charter, it became its duty to render such service to the city and its inhabitants as it was given the power to perform. As a part of its business, the Gas Company owns a system of pipes and it is just as essential for the purpose of furnishing the city and its inhabitants with gas, that the Company should provide lateral or service pipes as it is to provide mains.

The city cannot tap the private mains of the Gas Company without the latter's consent, nor have the inhabitants any power or right to lay service pipes in the streets of Chicago without the city's consent. The Gas Company has such power, and as a *quasi* public corporation, it is bound to exercise all of its powers at its own expense, to fully and adequately perform the service in which it is engaged, *i. e.*, to supply gas to the city and its inhabitants along the lines of its mains.

The Gas Company may, however, require all applicants to abide by its reasonable rules and regulations. It may, for instance, require a guarantee or contract whereby the applicant may be bound to use a reasonable amount of gas and pay

for the same before the Company is required to go to the expense of laying service pipes. It must, however, treat alike all persons similarly situated.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 4, 1913.

HON. JOHN D. RILEY, Superintendent Bureau of Maps.

Dear Sir:

On March 21st, 1913, you submitted to this department for an opinion, the protest of the Kenwood Residents Association relative to the proposed extension of the Chicago City Railway Company in Lake avenue from Forty-seventh street to Fifty-fifth street. In said protest certain questions have been raised, and you ask to be advised what action to take with reference to same.

In this communication we shall treat the questions in the numerical order in which they appear in the communication of the Kenwood Residents Association.

1. The first question raised relates to the method of computation. We assume that it is proposed to connect the Lake avenue extension with the line of the Chicago City Railway Company lying in Forty-seventh street. The question has arisen as to what your department shall consider the initial point of measurement in the petition of the City of Chicago Railway Company, since the statute provides that no petition shall be valid unless signed by the owners of the land representing more than one-half of the frontage of each mile or fraction thereof, "measuring from the *initial point* named in said petition of such street or part thereof sought to be used for railroad purposes."

In view of the fact that the company is now operating a street railway in Forty-seventh street under grants heretofore made by the City Council, we are of the opinion that the initial point of measurement should be at an imaginary line

intersecting Lake avenue, and connecting both of the south curbs on Forty-seventh street.

2. The question is raised whether abutting or terminating streets are to be included as frontage. We assume that the words "abutting" and "terminating" streets are synonymous with "intersecting" and "intercepting" streets.

The practice of the city as far as we have been able to learn has always been to disregard the frontage of intersecting and intercepting streets, in every case where frontage consents are required. It would seem that under the theory of contemporaneous construction alone, the city could not be justified in departing from a rule which it has adhered to for many years. Fortunately, however, the rule which the city has heretofore followed is supported by authority.

NELLIS on Street Railways, says in Section 34, Vol. —:

"In estimating the number of lineal feet of property necessary to authorize the consent of a municipality to the construction of a street railway the cross streets are to be omitted."

The foregoing proposition of law is also laid down in *Peoples Traction Company, etc. v. City of Atlantic City, etc.*, 71 N. J. L. reports 134, citing:

Curre v. Atlantic City Railway Company, 37 Vroom 140.

See also to same effect:

Dexter v. Sprague, 22 R. I. Rep. 324.

The foregoing in our opinion applies to intercepting, as well as to intersecting streets. The fact that such streets are streets by virtue of a common law dedication or by virtue of a statutory dedication is immaterial.

3-4-5. By virtue of what we have said above we deem it unnecessary to answer questions 3, 4 and 5.

6. Question has been raised in connection with "Blackstone Point." We have since been instructed by you to disregard this question.

The Kenwood Residents Association objects to the sufficiency of various frontage consents contained in the petition of the Chicago City Railway Company. We shall treat these

questions also in the numerical order in which they are presented.

1. Objection is raised to the consent of John Barkman on the ground that he is dead. The name of John Barkman appears in the frontage petition, and you have a right to assume that the signature is regular unless satisfactory evidence is submitted to you by affidavit or otherwise that said John Barkman was dead at the time he was purported to have signed said petition.

* * * * *

3. It is claimed that the consent to this property is not signed by the owners of record. We believe that the title to property as shown of record in the recorder's office should be used by you as a basis in your verification of the frontage petition. This has been the rule uniformly followed by your department and unless satisfactory evidence is presented to you that the person whose name appears on the petition is the actual owner of the property we are of the opinion such consent should be disregarded.

4. It is claimed that the consent by the executrix of the estate of George Christian is insufficient for the reason the title is not vested in such executrix. It is alleged that the records show that George Christian who held title, died intestate, leaving several heirs.

We are of the opinion that this consent should not be disregarded for the reason that such executrix may hold property under a will in such a manner as to give her the right to sign the frontage consent petition.

We are unable to understand, however, how there can be an executrix of the estate, in view of the fact that George Christian died intestate.

5. If you are satisfied that the consent to this property is signed by a stranger to the title it is your duty to disregard it.

6. The record shows this property to be in the estate of Charles Friedriche. The consent is signed by Julia Friedriche, nothing appearing that she is the only heir at law.

We are of the opinion that you have a right to assume that the consent is sufficient unless satisfactory evidence is

presented to you that said Julia Friedriche is not the only heir at law.

7. The name of Charles Swigert is signed to the consent by R. E. Humphrey who signs as agent. The question is raised as to the authority of the agent to sign the consent. It is suggested that such authority does not appear of record.

It is our opinion that you have a right to assume authority in the agent until the contrary is satisfactorily proven to you.

8. What we said in answer to question 3 applies here.

9. If the consent has been properly revoked it is your duty to disregard it.

10. The description contains one hundred and ninety-seven feet but consents are filed for two hundred and twelve feet. The actual measurement of the frontage should control.

11. The owner consents for one hundred feet. Said owner has since sold fifty feet and the new purchaser has also filed a consent for his fifty feet of frontage. The total frontage in this case to be considered by you should be one hundred feet and not one hundred and fifty feet.

The Kenwood Residents Association also raises the question as to the proper method by which the city may indicate its consent with respect to the property which it owns along the line of the proposed extension.

Our statute provides that,

“The City Council or Board of Trustees shall have no power to grant the use of the right to lay down any railroad tracks in any street of the city to any * * * electric * * * or other railroad company * * * except upon the petition of the owners of the land representing more than one-half of the frontage of the street * * *.”

It has been urged by the representative of the Traction Company that the consent of the city with respect to frontage owned by it along the proposed line of street railway is given by the passage of the ordinance providing for the extension, and that no further consent is necessary.

The courts have uniformly held that the consent of abutting property owners, when required by statute, is a condition precedent to the right to occupy streets, and that

until this condition is complied with a street railway company has no authority to commence the work of construction. The procuring of the necessary frontage consents is jurisdictional and unlike conditions subsequent which may be waived by municipal authorities the failure to secure sufficient frontage consents is fatal to the grant.

Booth on Street Railways, par. 18, Sec. 24.

Roberts v. Easton, 19 Ohio St. 78.

Attorney General v. Chicago Horse and Dummy Railroad Company, 121 Ill. 638.

People Ex Rel. etc. v. Newton, 58 N. Y. 439.

Wiggins Ferry Co. v. East St. Louis Railroad Company, 107 Ill., page 450.

North Chicago Street Railway Company v. Cheetham, 58 Ill., App. 318.

Under the foregoing decisions we are inclined to the opinion that the consent of the city to its frontage must be given in some manner before the ordinance providing for the extension is passed.

See also:

Emerson v. Forest City Railway, 28 Ohio, Cir. Dec. page 683.

Nellis on Street Railway in Vol. 1, Sec. 34, says:

“Where the consents required of abutting owners are by statute on the basis of foot frontage and there is no provision in the statute in respect to city property, and the written consents of a majority of the abutting owners is necessary to confer power upon a city council to grant a franchise to construct a street railway, the city as owner of a portion of the property abutting upon a proposed street railway line, may grant its consent and be included in the necessary majority although it also acts as the grantor of the franchise. In the absence of a legislative intent to the contrary the city is as much entitled as any other abutting owner to sign such a consent and the fact that in so doing and also in acting upon the granting of a franchise it acts in a dual capacity, is not against public policy.”

Since the city for the purpose of the frontage petition is to be regarded in the same light as any other owner of land along the proposed line of street railway, the question pre-

sents itself as to what would be the proper method by which the city may indicate its consent.

We are of the opinion that an ordinance authorizing the Mayor and Comptroller to sign the consent of the city to the petition as owner of the city frontage should first be passed. After the passage of such ordinance said Mayor and Comptroller should sign the frontage petition in the same manner as any other owner of property.

See *Emerson v. Forest City Railway, supra*.

You also call attention to the fact that the consenting petitions and revocations are, in certain instances, in a condition of confusion. You state that in some cases there are three revocations against two consents or *vice versa* and that in some instances the dates are omitted.

We would advise that where you have several undated consents and revocations from the same persons you should disregard the undated revocations. One desiring to revoke his consent should revoke it in such a manner as to leave no question as to his intent. If there is any question as to the intent you have a right to assume that the signer of the petition intended to abide by his first act.

We are herewith returning all communications, papers and books which you have transmitted to us.

Respectfully submitted,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

APRIL 4, 1913.

HON. ELLIS GEIGER, Alderman, 21st Ward.

Dear Sir:

In your letter of March 18, 1913, addressed to William H. Sexton, Corporation Counsel, you request an opinion with reference to certain questions of frontage consents which have arisen in connection with the proposed extension of the Chicago Railways Company on East Chicago avenue from Clark

street to Fairbank court and on Fairbank court from East Chicago avenue to Indiana street.

The city owns several hundred feet of frontage on East Chicago avenue and you desire to be advised on the following points:

1st. Is the city for the purpose of consenting or refusing its consent to a petition for an extension of street railway on a street on which the property of the city abuts an owner of land within the meaning of the statute requiring the consent of owners of land according to frontage for each mile or fraction thereof?

2. If the city is to be regarded as a land owner within the meaning of the statute requiring consent of abutting property owners, what is the legal method by which the city may evidence its consent?

First: In *Theurer v. the People*, 211 Ill. 296, there was presented to the court the question whether the Board of Park Commissioners for the purpose of consenting or refusing to give consent to the granting of a license to open a dramshop upon a street on which a park abutted was a property owner within the meaning of an ordinance requiring consent of property owners according to frontage.

At page 300 the court said:

“We think it clear that the South Park Commissioners, for the purpose of giving consent to the granting of a dramshop license authorizing the keeping of a saloon upon property abutting upon a street which adjoins park property, is an owner, within the meaning of said ordinance, and that the park frontage upon Cottage Grove avenue and Fifty-first street must be considered in determining whether the application filed by the appellant was signed by a majority of the property owners, according to frontage, upon the four streets surrounding the block in which the said dram-shop was to be kept.”

In *Dexter v. Sprague*, 22 R. I. 324, the court said at page 325:

“The city has control of the park in a different way and to a greater extent than it has control of a highway. Its control of the park for the purposes of this act is as complete as that of any owner of land. As a public resort the city has a peculiar interest in the surroundings of the park, and clearly should have the right to object to the locating of liquor saloons in its vicinity.

We are, therefore, of opinion that it has the rights of an owner and occupant under this statute."

In *Paterson Railroad Company v. Mayor*, 24 N. J. Eq. 158 the court said at page 165:

"It does not appear who now owns the fee, nor is that a matter of any importance. It may be, for aught that appears in the case, in the city corporation. But whether it is or not, or in whomsoever it may be, the city corporation are, for the purposes of the consent, to be regarded as its owners."

And further on the same page the court said:

"The legislature, in thus requiring the consent of the majority of the property owners, intended merely to make it a matter of choice with them, whether the railway should be laid or not. The city in reference to the square, is an owner within the meaning of the act. It is the duty of the city authorities, and they are the proper persons, to judge as to whether the railway in the street would be prejudicial to the public property or otherwise, and that too, in regard to property dedicated to public use, as well as to public property the fee whereof is in the corporation."

We believe it is apparent from the foregoing that the city is to be regarded in the same manner as any other abutting owner of property and that if it is desired to include the frontage of the city as favoring the proposed extension under consideration such city frontage should be treated on the same basis as the frontage of any other abutting land owner.

* * * * *

Yours very truly,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

APRIL 7, 1913.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

Your communication to this department, dated February 24, 1913, stating that the Committee on Judiciary, State Legislation, Elections and Rules, requests an opinion as to the city's

power to establish and maintain municipal market houses and ice plants has been assigned to me; the communication also enclosing copy of order passed by the City Council of February 24, 1913 relative to the same matter. In as much as we are informed that the committee, as at present constituted, has held its last meeting, we address our reply to you so that it may be transmitted to the new committee when formed.

Whatever power and authority the city has to establish and maintain such plants is derived by a delegation of power from the State legislature by statute. Such delegated power has been given to the City of Chicago to establish municipal market houses under clauses 49 and 50 of Section 1, Article 5, Chapter 24, R. S. of Ill. 1912, which are as follows:

“To establish markets and market-houses, and provide for the regulation and use thereof.”

“To regulate the sale of meats, poultry, fish, butter cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same.”

This right and authority has been passed upon and sustained by the Supreme Court in the case of *Caldwell v. City of Alton*, 33 Ill. 417. The court on page 418 said:

“That the charter of the City of Alton provides that its common council shall have the power to establish and regulate markets; that the council did, in pursuance of this provision, pass an ordinance.”

And the court further states:

“It is a principal, everywhere recognized, that a corporation, public or private, possesses and can exercise no other powers than those specifically conferred by the act creating it, or such as are incidental or necessary to carry into effect the purposes for which it was created. *Trustees v. McConnel*, 12 Ill. 140; 2 Kent Com. 298; *McIntire v. Preston*, 5 Gilm. 60; *Firemen's Ins. Co. v. Ely*, 2 Cow. 709; Ang. & A. on Corp. 85.

The power, therefore, to establish and regulate markets, includes the power to purchase the site and the erection of the necessary buildings and stalls upon it, and, when provided, to adopt such rules in regard to it, and to the business to be there transacted, so may be deemed reasonable and just.”

In reference to ice plants there exists no such specific delegated power to the City of Chicago to purchase, establish

or maintain plants of this nature, unless such power is necessarily implied to carry out some of its delegated powers.

The Supreme Court in passing upon the powers of corporations in the leading case of the *People v. Pullman Car Co.*, 175 Ill. 125, on page 136 dwells upon delegated powers of corporations and more especially upon powers that are necessarily implied in the following language.

“A corporation in our State has its existence by virtue of the enactment, general or special, of the law-making power. The appellee corporation was created by a special act of the General Assembly. The only difference between a corporation organized under a general law and one created by a special statute is, ‘that in the former we look to the certificate of the promoters, while in the latter we look to the special statute to ascertain the scope of the powers of the corporation.’ The rule for construing the instruments must necessarily be the same, viz., the powers specifically enumerated, and such other powers as are incidental or necessary to carry those powers into effect, but none others may be exercised by the corporation. *Rockhold v. Canton Masonic Benevolent Society*, 129 Ill. 440.

The enactment creating the appellee corporation is the full measure of its power. In order to enable it to carry into execution the powers thus conferred it may exercise other powers, known to the law as incidental or implied powers. Implied powers exist only to enable a corporation to carry out the express powers granted,—that is, to accomplish the purpose of its existence,—and can in no case avail to enlarge the express powers, and thereby warrant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises not directly but only remotely connected with its specific corporate purposes. A power which the law will regard as existing by implication must be one in a sense necessary,—that is, needful, suitable and proper to accomplish the object of the grant, and one that is directly and immediately appropriate to the execution of the specific powers, and not one that has but a slight, indirect or remote relation to the specific purposes of the corporation.”

We quote from Sec. 89, Dillon on Mun. Corps. :

“Extent of Power; Limitation; Canons of Construction. It is a general and undisputed proposition of law that a *municipal corporation possesses and can exercise*

the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void. Much less can any power be exercised, or any act done, which is forbidden by charter or statute. These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations. Their reasonableness, their necessity, and their salutary character have been often vindicated, but never more forcibly than by the late learned Chief Justice Shaw, who, speaking of municipal and public corporations, says: ‘*They can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their associates. This principle is derived from the nature of corporations, the mode in which they are organized, and in which their affairs must be conducted.*’

Therefore, in our opinion, the City of Chicago has express powers to purchase, establish and maintain municipal market houses, but it has no authority to purchase, establish and maintain municipal ice plants and can only obtain such authority by an amendment to the statute conferring that power upon it by the legislature.

Yours respectfully,

M. W. CAGNEY,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 7, 1913.

TO THE HONORABLE, THE CITY COUNCIL, OF THE CITY OF CHICAGO.

Gentlemen :

On February 24, 1913, your Honorable Body passed the following order :

“That the Corporation Counsel be and he is hereby directed to draft an amendatory ordinance to our present vagrancy ordinance, such amendatory ordinance to embody all the essential provisions of the Philadelphia Vagrancy Act, and report the same at as early a date as possible, to this City Council for the consideration of this body.”

We are also in receipt of a letter from Hon. John, McWeeny, General Superintendent of Police, in which he says:

“According to our present vagrancy law it is next to impossible to convict a well-known thief and I believe there is an urgent necessity that our present State law governing vagrants be changed.”

I have therefore examined the vagrancy laws of the large cities of the United States with a view of improving on the provisions of our Code and statutes.

The present ordinances and statutes defining vagabonds are very comprehensive. I do not believe the definition can be improved. Both the City Code and the statutes provide substantially:

“270. VAGABONDS—WHAT SHALL CONSTITUTE.)

§270. All persons who are idle and dissolute, and who go about begging; all persons who use any juggling or other unlawful games or plays; runaways; pilferers; confidence men; common drunkards; common night-walkers; lewd, wanton and lascivious persons, in speech or behavior; common railers and brawlers; persons who are habitually neglectful of their employment or their calling, and do not lawfully provide for themselves, or for the support of their families; and all persons who are idle or dissolute and who neglect all lawful business, and who habitually mis-spend their time by frequenting houses of ill-fame, gaming houses or tippling shops; all persons lodging in or found in the night time in out houses, sheds, barns or unoccupied buildings or lodging in the open air, and not giving a good account of themselves; and all persons who are known to be thieves, burglars or pick-

pockets, either by their own confession or otherwise, or by having been convicted of larceny, burglary, or other crime against the laws of the state, punishable by imprisonment in the state prison, or in a house of correction of any city, and having no lawful means of support, are habitually found prowling around any steamboat landing, railroad depot, banking institution, broker's office, place of public amusement, auction room, store, shop or crowded thoroughfare, car or omnibus, or at any public gathering or assembly, or lounging about any court room, private dwelling houses or out-houses, or are found in any house of ill-fame, gambling house, or tippling shop, shall be deemed to be and they are declared to be vagabonds. (As amended by act approved April 27, 1877. In force July 1, 1877.)"

Section 271 provides:

"It shall be the duty of the sheriff, bailiff of the Municipal Court * * * *to arrest upon warrant, etc.*"

The difficulty in effective prosecution arises from the fact that pickpockets, confidence men and others of that profession can not now be arrested in the first instance without a warrant. This is a serious defect. To compel an officer to return for a warrant before making an arrest on a charge of vagrancy is almost equivalent to permitting them to operate with immunity.

To meet this objection I have prepared an amendment to the statute. The amendment follows the statute as it was in force prior to 1907. It permits arrest *on view without a warrant*.

The person arrested, however, must be immediately "booked." While the police department would be greatly aided if twenty-four or thirty-six hours were permitted to elapse before "booking," yet I believe this provision would not be sound.

Your order refers to the provisions in Philadelphia. The right to arrest without a warrant is the only advantage that Philadelphia has over our system. Under the proposed amendment as under the present law, the offender may be sentenced to imprisonment for not less than ten days nor more than six months, or a fine of not less than \$20 nor more than \$100 may be imposed.

There is some doubt as to the right to arrest without a warrant in a case of vagrancy. The point is raised in the case of *Shanley v. Wells*, 71 Ill. 78, wherein the court says:

“It may well be questioned whether, from the peculiar elements which are essential to constitute the offense of vagrancy, it belongs to the class of offenses for which an arrest may be made without a warrant; but even conceding that it does, it was certainly incumbent on the defendant to show that the offense was in fact committed in his presence. The burden was on him to establish that fact by satisfactory evidence. What may have been his motives in making the arrest, or what the information he received from others, would, obviously, therefore, be unimportant, as neither could tend to prove the commission of the offense of vagrancy in the presence of the defendant.”

I believe however, that the amendment will receive a favorable construction if presented to the courts.

The proof required to convict a pickpocket or a confidence man of being a vagrant has given the police department much difficulty. Some of the courts have adopted the construction as complained of in Chief McWeeny's letter. The point has just been discussed by the Appellate Court in the case of *People v. O'Keefe*, decided in March, 1913. O'Keefe, a well-known pickpocket, was charged with being a vagrant and was sentenced to six months' imprisonment by the Municipal Court. The Appellate Court in reviewing the case said:

“The evidence showed that the defendant was known to be a pickpocket, and had been seen frequently in company of pickpockets, and two of the witnesses testified that they had known defendant for five years and had never known him to be employed. Although confronted with this evidence, the defendant did not see fit to introduce any evidence to show that he had any lawful means of support. If he had some means of support it was a fact peculiarly within the knowledge of the defendant, and, in view of the evidence introduced by the People, we think it was incumbent upon him to show, if he could, that he had lawful means of support.”

This decision clears the situation and removes much of the difficulty formerly experienced. It should make convictions

easier as it substantially amounts to putting the burden of proof upon the accused to show that he had "lawful means of support."

If the proposed amendment is passed by the legislature, the power therein given, together with the rule announced in the O'Keefe case will give our city as effective a law as is in force in the cities of any other state.

I transmit herewith the proposed amendment.

Very respectfully,

GEO. L. REKER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 10, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You referred to this department certain reports sent to you by the Juvenile Protective Association regarding the Dearborn Dancing Academy and Roosevelt Hall, two public dance halls located respectively at 443 and 645 North Clark street. Your inquiry was whether, under the law, you could issue instructions to the police to close such places.

The reports indicate that the dance halls in question are carried on in such a way that there is a show or outward appearance of keeping within the law, but that in fact persons of low moral standards congregate there, among them prostitutes who solicit patronage from the men in attendance and some of whom behave towards young or strange girls who happen to be there very much as if they were procuresses. Without going into details concerning these reports we note that one male investigator was solicited in the manner indicated by eleven women in the course of a visit to one of these places, and that the other place is frequented by many so-called "cadets," very young girls, most of whom are known as prostitutes and who ply their trade without concealment at various dance halls. Aside from this it seems that an intoxicating

liquor is sold under the guise of a soft drink called "Near Beer," which is in itself a violation of the ordinances.

The summary power of the executive in such cases is based on his right to abate nuisances. It is the same as his power over any other place of amusement. If the atmosphere of such a place is so immoral that its indecency is manifest, it can be closed as a public nuisance, otherwise not.

The character or reputation of the habitues of a place of amusement is not the determining factor, since even immoral persons have a right to pursue their pleasures if done in a lawful way. But such general and open solicitation as appears to be the vogue at these places, to say nothing of other practices, constitutes them disorderly houses, and it is not to be presumed that the managers are ignorant of these conditions.

The police power of the municipality extends to all forms of amusements, whether they are presented to the public as in the case of theaters, or the public itself participates, as in the case of dances, games, etc.

Freund on Police Power, Section 250.

A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society, is a public nuisance, and any exhibition, entertainment or amusement which tends to pander to vicious tastes and to draw together the vicious and disorderly members of society is included under that head.

Wood on Nuisances, Section 68.

When a public place of amusement not only becomes the resort of depraved and immoral persons, but such persons are permitted to pursue their immoral practices without any attempt at concealment, so that those persons who have gone there innocently cannot escape the contamination, as appears to be the case in the present instance, you will be justified

in treating the place as a disorderly resort and closing it as a nuisance.

Yours respectfully,
(Signed.) LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

(Signed.) JOHN W. BECKWITH,
Acting Corporation Counsel.

APRIL 11, 1913.

MR. J. C. McDONNELL, Chief, Bureau of Fire Prevention and Public Safety.

Dear Sir:

In your letter of March 19, 1913, you ask to be advised as to the construction of certain words and phrases used in Section 245-a as amended on March 10, 1913, (C. P. 3985) of the ordinance creating a Bureau of Fire Prevention and Public Safety passed on July 22, 1912. (C. P. 1543.)

The amendment to said Section 245-a reads as follows:

“Provided, that whenever application is made to construct any such tank or tanks in any block or square in which two-thirds of the property according to frontage on both sides of the street is used exclusively for residence purposes, such application shall be accompanied by the written consent of a majority of the property owners according to frontage in such block or square, before a permit shall issue. This provision shall not be applicable to the construction of a tank, or tanks, to be used in connection with a private garage.”

Your first query relates to the construction of the words “block” or “square.” Webster defines the word “square” as, “an area of four sides, generally with houses on each side.”

Our courts have had occasion to construe the word “block” in the case of *Harrison v. People*, 195 Ill. 466. At page 470 the court said:

“The word ‘block’ as used in the ordinance is synonymous with the word ‘square’ and means the territory bounded by four streets. The word ‘block’ is defined by the Century Dictionary and Webster as ‘a square or portion of a city enclosed by streets, whether occupied

by buildings or not.' In *Ottawa v. Barney*, 10 Kan. 270, Mr. Justice BREWER, in referring to the above definition said: 'We are well satisfied with the definition, and taking it as our guide in this decision, it follows, as a matter of course, that the word 'square' used by the complainant is synonymous with the word 'block.'''

We are of the opinion that the words "block" and "square" are used synonymously and refer to any rectangular area which is bounded by four streets.

You further desire to be informed whether an apartment building in the course of erection is to be taken into consideration in estimating frontage. The ordinance contemplates improvements of a permanent nature. The fact that such improvements are not entirely completed at the time that the frontage count is made, is no reason why such improvements should be disregarded. The character of the premises as residence property becomes clearly established and we are, therefore, of the opinion that the particular building you have in mind, cannot be considered as vacant or business property but must be classified as residence property.

You also desire to be advised whether the frontage of a residence in which a doctor has his office, can be classified as property used "exclusively" for residence purposes.

This department, in former opinions, has had occasion to pass on this question and has always held that the incidental use of residence property for some purpose other than residence purposes, should not control the character of the premises.

You ask the specific question if it will be necessary to secure frontage consents in a "block" when the total number of feet is 3,000 and 1,999 feet are devoted exclusively to residence purposes.

You will observe that the ordinance provides that frontage consents are required whenever two-thirds of the property, according to frontage on "*both sides of the street*," is used "*exclusively for residence purposes*." If the ordinance used the plural word "*streets*" instead of the singular word "*streets*" there would be no question but that frontage consents are required whenever two-thirds of the frontage on the streets surrounding the block are use exclusively for resi-

dence purposes. Since the singular word "streets" is used, however, the matter is enveloped in more or less doubt.

In *Harrison v. People supra*, our court had occasion to construe Section 1 of an ordinance passed by the Village of Hyde Park. This ordinance provided that any person who desired to obtain a license to keep a saloon or dram-shop, should present his application in writing to the village comptroller. The ordinance further provided that the application should be signed by a majority of the property owners according to frontage on "*both sides of the street*" in the block upon which such dram-shop was to be kept. On page 471, the court said:

"In construing ordinances, no less than statutes, all general provisions, terms, phrases and expressions should be liberally construed, in order that their true intent and meaning may be fully carried out; and where great inconvenience or absurd consequences would result from a particular construction that construction should be avoided, if possible. (*People v. Harrison*, 191 Ill. 257.) The persons who will be injuriously affected by a dram-shop are not those, alone, who own property or reside or are engaged in business upon the street upon which it has its main entrance, but it directly affects the character and value of all the property in the block where it is located."

The court held in this case that the application should have been signed by a majority of the property owners according to frontage upon both sides of "*each street*" surrounding the block, notwithstanding the fact that the ordinance required a majority of the property owners according to the frontage on "*both sides of the street*" in the block upon which the dram-shop was to be located.

We are of the opinion that the case of *Harrison v. People, supra*, is controlling and that if two-thirds of the property on the streets surrounding the block are used exclusively for residence purposes, it will be necessary to secure a majority of the frontage consents. In such case the consents required would be a majority of the frontage of the four sides bounding such block.

Answering your question specifically if the total amount of frontage in the block or square is 3,000 feet and 1,999 feet

are used exclusively for residence purposes, it will not be necessary to obtain frontage consents.

Respectfully yours,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

APRIL 14, 1913.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

Your letter of April 11th, inst., presents the question: "It has developed in the examination of some hospitals that they include in their 'charity bed day patients' paid employes of the hospital that might have been taken sick while in their employ. Should these be construed as charity patients or not?"

The liberal policy of the city in remitting hospital license fees should be construed as a donation of so much money to charity and as such it must be devoted to a *bona fide* charity the same as other public moneys. The license fee for a hospital is \$100.00. The institution must be in a nature public.

The most favorable construction that can be given to the claim of the hospital under consideration, is that the assistance they give their employes when sick is a kind of private charity, although it might be argued that it is no charity at all but a policy which the hospital adopts to secure greater efficiency from its employes.

It is also well-known that many of the employes of hospitals have their board included in their salary.

As you are aware, many hospitals who do not come within the ordinance, resort to various subterfuges to avoid paying the fee.

I believe that the claim referred to in your letter is another of the various devices set up and that it should be denied. If the Municipal Court finds that the ordinance is open

to any such construction as claimed, we can have the ordinance amended.

Very respectfully,

GEO. L. REKER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 15, 1913.

MR. EDWARD C. WALLER, JR., 65 W. Washington Street, Chicago.

Dear Sir:

We are in receipt of your communication of the 9th inst., in regard to the matter mentioned in the caption hereof.

In our communication to the City Collector, under date of April 7, we expressed the opinion that your notices of objection to the renewal of the license in question, stating that the signer thereof (yourself) "controls over 50 per cent. of the frontage in the block," did not purport to be signed by any property owner or *bona fide* householders, persons or firms doing business on either side of the street in the block upon which the dramshop has its main entrance.

The only persons having the right under the ordinance to object to the granting or renewing of a saloon license are "property owners of *bona fide* householders, persons and firms doing business upon both sides of the street in the block upon which the said dramshop has its main entrance."

The notice, therefore, in order to have standing must disclose the basis upon which the signer claims the right to object to the granting or renewing of the license.

Under the provisions of the ordinance a notice which is sufficient in itself must be filed at least thirty days prior to the time for the renewal of the license. In the matter of the filing of the notice, time is of the essence. A notice which is insufficient when filed can not be remedied and made sufficient within thirty days prior to the time for the renewal of the license. Even if the rule were otherwise and the matter stated in your letter of the 9th inst. could be considered as supple-

menting your notices, dated April 1, we are of the opinion that the notices would still fail to meet the ordinance requirements.

The Supreme Court of this State has repeatedly held that the term "owner" when applied to real estate means an estate in fee simple (*Bowen v. John*, 201 Ill. 292, 295) and this department has held that said definition of the term "owner" applies to the words "property owners" as used in the dramshop ordinance of the former Village of Hyde Park, which said ordinance controls the matter under consideration. (Vol. 2, Opinions of the Corporation Counsel, p. 1062.)

It appears from your communication of April 9, that you are not the owner of the land in fee simple. You state that you are the "attorney in fact for the actual owners of the land in that entire block." The notice, however, is not signed by or in the names of the persons who are the owners of the land. The ordinance provision is that the notice shall be "a notice stating that the signers thereof object to the granting or renewing of the license." In order for the notice to be given effect as a notice of the owners of the land it would have to be signed in the names of such owners either by themselves or by their authorized agent. The notice is signed only by yourself and does not purport to be signed on behalf of any one else. You, therefore, stand as the only objector. Inasmuch as you are not a "property owner" in the block under the view above expressed it follows that the petition is not signed by any property owner.

You state that you are an "actual *bona fide* householder." The ordinance provision in respect to *bona fide* householders is that the notice of objection shall be signed by "at least one-quarter of the property owners or *bona fide* householders, persons and firms doing business upon both sides of the street in the block upon which the said dramshop has its main entrance."

We are informed that there are a number of occupied stores on the east side of Cottage Grove avenue opposite to the block in question. If our information on this point is correct, the notices filed by you are not signed by the required one-quarter of the *bona fide* householders, persons and firms

doing business upon both sides of the street in the block upon which the said dramshop has its main entrance.

We are, therefore, still of the opinion that your notices do not meet the ordinance requirements.

In view of the foregoing we have not deemed it necessary to consider further the question of whether the notices were filed in apt time.

Yours very truly,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 17, 1913.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

On March 10, 1913 the following order was passed by your Honorable Body:

“ORDERED, That the Corporation Counsel of the City of Chicago be requested to submit to the City Council an opinion as to the rights of the City to install sewers and water mains under the sidewalks of the streets of Chicago, especially in the down-town district, and as to the rights of the City to require or permit the installation of pipes and conduits belonging to the various public utility companies under the sidewalks in the down-town portion of the city.”

In rendering an opinion to your honorable body as to the legal matters involved in the above mentioned order, it would be well for convenience to subdivide the order into appropriate points.

First, as to the rights of the City of Chicago to install sewers and water mains under the sidewalks of the streets of Chicago, especially in the down town district.

At the outset, it might be well to state that as to the city's rights in the streets, there is no difference between the streets down town and the streets otherwise situated.

The city's rights and ownership in streets is of two descriptions.

(a) Where the fee is in the city and it possesses ownership thereof absolute in character with the exception of its rights of alienation and purposes of use. In other words under a complete statutory dedication there is a fee in the city in respect to the streets which permits the city to use the streets for all purposes for which streets may be properly used in conformity with their dedication, but at the same time the city is limited to such purposes of dedication and has but a qualified power of alienation, viz: when no longer useful for purposes of streets;

(b) Where there is a common law dedication of streets and the fee is in the abutting property owner, the city is vested with an easement therein or a right to use the streets for all legitimate street purposes. In both the case of statutory and common law dedications, the use of the streets for legitimate street purposes is the same, but in common law dedications, the abutting property owner retains the right to use the subsurface portions of his land which do not interfere with the use of the street.

Sears v. City of Chicago, 247 Ill. 204.

The installation of sewers and water mains being convenient, incidental and proper uses of the subsurface portion of streets, the right of the city to install and maintain such utilities is unquestioned and it makes no difference whether these sewers and mains are under the street proper, lying between curb lines or under the sidewalks, sidewalks being merely a portion of the street reserved for foot travel and being in reality a part of the street itself from building line to building line.

As said by Judge DILLON, §1155, "Municipal Corporations":

"But, upon whatever view it be founded, some courts have, rightfully in our judgment, held that the public uses to which a city street may be applied without imposing an additional burden or servitude upon the fee are not to be limited by arbitrary rules, but are to be extended to meet public wants and necessities occasioned, it

may be, by the enlarged uses to which abutting property is devoted."

In *McDevitt v. Peoples Natural Gas Company*, 160 Pa. 367, it is said:

"The necessity for drainage, for a water supply for gas for purposes of lighting, for natural or fuel gas for heat, for subways, for telegraph and other wires, and for other urban necessities or conveniences, give to the municipality a control over the surface that a town has not. * * * A city has the rights to use the streets and alleys to whatever depth below the surface it may be desirable to go, for sewers, gas, and water mains, and all other similar uses. On taking the streets for these necessary or desirable purposes it is acting, not for its own profit, but for the public good. It is the representative of the inhabitants of the city, considering their health and family comfort, and their business needs; every lot owner shares in the benefits which such an appropriation of the streets and alleys confers. If the city has control over the soil in and under the streets, it compensates him by making him a sharer in the public advantages that result from proper drainage, from the water supply, and from the general distribution of gas and the like. The disturbance of the owner's control over the subsurface of the street is in a legal sense an invasion of his rights, but it is *damnum absque injuria*. He has no right of action against the municipality therefor."

Judge DILLON also remarks in §1148 of the treatise above mentioned:

"The construction of sewers is a lawful use of the street as against an abutting proprietor, whether the fee of the street be in him, or in the city in trust for street uses. Although the fee of the street may be in the abutting proprietor, the use of the street for the purposes of sewers is not the imposition of a new use or servitude entitling the owner of the fee to compensation. * * * Hence authority to a municipal corporation, by its charter, to repair and keep in order its streets, is sufficient, without special grant to authorize it to construct drains and sewers; * * *."

The powers granted to the City Council of Chicago by the legislature by Section 1, Article V include:

"Seventh. To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets,

alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same."

"Ninth. To regulate the use of the same."

"Eleventh. To provide for the lighting of the same."

"Thirteenth. To regulate the openings therein for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights; * * *."

"Fourteenth. To regulate the use of sidewalks and all structures thereunder; * * *."

"Fifty-seventh. To regulate the construction, repairs and use of vaults, cisterns, areas, hydrants, pumps, sewers and gutters."

"Sixty-sixth. To regulate the police of the city on village, and pass and enforce all necessary police ordinances."

"Seventy-eighth. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease."

Under these broad provisions it is apparent that the largest delegation of power, with respect to the use and control of the streets, has been given to the City Council by the State and under the authorities above cited there can be no doubt as to the right of the city to install sewers and water mains under the sidewalks of the streets of Chicago, whether in the downtown district or thereout.

Second. As to the rights of the city to require or permit the installation of pipes and conduits belonging to the various public utility companies under the sidewalks in the downtown portion of the city, the same observation may be here made as above, that no differentiation should be made as to the downtown portion of the city. Public rights in the streets are not altered by or dependent on the location of such streets.

To *require* the installation of pipes and conduits of public utility companies under the sidewalks, I assume to involve the inquiry by your Honorable Body as to whether the city can compel installation by such companies of its pipes under the sidewalk instead of under the surface of the street proper; in other words, compel changing from the present location of such pipes to a new location under the sidewalks.

I am of the opinion that this change can be required where the public necessity or the amplified use of the street for

transportation purposes or other legitimate purposes require such change. Public utility works are placed in the street under mere permits and the companies controlling them have no vested rights in their present location such as would prevent their change or removal when paramount public necessities supervene. For instance, this department has heretofore held that the construction of subways might necessitate the change of public utility companies' conduits from one portion of the street to another and the same might be held in the event that the installation of a high pressure water system should require the occupation by the city's mains of the space now occupied by the pipes of the public utility companies. To this extent then, the change may be compelled by the city and without rendering the city liable for the expense of any removal on the part of such public utilities corporations.

As to the *permission* of the installation of pipes, etc. of public utility corporations under the sidewalks, such permission may be granted by the city upon the ground that these corporations are fulfilling *quasi* public functions and the use of the streets by such companies for their instrumentalities is of general benefit to the public and thus is not an additional servitude upon the streets.

To recapitulate the points upon which legal opinion is asked in your order, it may be stated:

First. The city has the right to install sewers and water mains under the sidewalks of the streets of Chicago whether in the down town district or any other district, within the corporate limits;

Second. The city may require and compel the installation of pipes and conduits belonging to various public utility companies under sidewalks as to pipes already in the streets and not under sidewalks when there is a necessity for a legal use of the street or its subsurface consistent with public convenience or welfare. As to new installations, these can be, in the first instance, required to be made under the sidewalks;

Third. The city may permit the installation of pipes and conduits belonging to such companies under the sidewalks as a measure calculated to promote public health,

safety, welfare and comfort by the better or more adequate distribtuion of public necessities such as gas, electricity, etc.

Very respectfully yours,

JOHN W. BECKWITH,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 19, 1913.

HON. JAMES S. MCINERNEY, Prosecuting Attorney.

Dear Sir:

On April 11, 1913 you asked for an opinion upon a state of facts which can best be presented in the following illustration.

A pickpocket is sentenced to imprisonment in the House of Correction. He appeals to the Appellate Court, where the case is pending for some time. During this period he is arrested for the violation of a city ordinance. A jury trial is demanded and he is released on bond. Before the city case is reached for trial, the Appellate Court has affirmed the first conviction and the defendant begins to serve his sentence in the House of Correction.

When the city case is called the bondsmen either produces the defendant in the custody of an officer or the bondsman makes the claim that because the defendant is in the custody of the Superintendent of the House of Correction he is therefore prevented by the state from producing the defendant and the bond is thereby released.

When the defendant is produced in court the bondsman's liability is terminated. If the defendant is adjudged guilty and fined, he is delivered to the Superintendent of the House of Correction, who by the form of the mittimus now in use must give the prisoner credit on the fine from the day of his receipt, regardless of the mittimus in the case of the former conviction.

Since the imprisonment upon the city judgment can not exceed six months, this usually expires before the sentence

in the other case and the prisoner thereby satisfies the form of the city sentence but none of the substance.

I have examined the law in the matter of the liability of the bondsman to produce the defendant regardless of his imprisonment elsewhere. It is well settled that such imprisonment or even his enlistment in the United States Army does not exonerate the bond, since the bondsman may secure the person of the defendant by an appropriate writ of *habeas corpus*.

See:

Brown v. People, 26 Ill. 28.

Mix v. People, 26 Ill. 32.

Shook v. People, 39 Ill. 443.

Section 19 of Division 3 of the Criminal Code provides:

“That the Act of God shall exonerate a bond.”

This should be construed as an exclusion of all other causes.

In *Piercy v. People*, 10 Ill. App. 219, the court said:

“Nothing but the death of the principal is such an Act of God as will discharge the sureties under the law.”

Under the mittimus used in the Municipal Court there is no question but that the Superintendent of the House of Correction must run the two sentences concurrently. There is no reason however why the judge of the Municipal Court may not so provide in the judgment that the second sentence shall not begin to run until the expiration of the first.

Mr. J. Kent Green, Assistant to Judge Olson, has prepared such a form of mittimus. Mr. Whitman has agreed to carry it out if it is sent to him.

I therefore advise you to ask the Municipal Court to forfeit the bonds where the defendant is not produced or upon conviction to ask the court to enter the form of mittimus drawn by Mr. Green, which is herewith transmitted.

Very respectfully,

GEO. L. REKER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 29, 1913.

HON. GEORGE PRETZEL, Alderman, 26th Ward.

Dear Sir:

Your communication dated April 18, 1913, to this office, relative to recalling a building permit to erect a blacksmith shop at 5019 Lincoln avenue, has been assigned to me; your contention being that the place in question is in a residence block and that a permit should not issue unless frontage consents are given. Lincoln avenue at this point has a street car line on it.

From the result of an investigation made through this office we are of the opinion that 5019 Lincoln avenue is not a block in which one-half of the buildings on both sides of the street are used exclusively for residence purposes, as set out in Section 712 of the Chicago Code of 1911.

In passing upon this question the block is taken as extending from Winnemac avenue on the north to Ainslie street on the south on Lincoln avenue and the location of Argyle street is disregarded inasmuch as it does not cross Lincoln avenue but starts at Lincoln avenue and runs west, though the site of the proposed blacksmith shop is north of Argyle street and on the east side of Lincoln avenue.

The definition of "block" is synonymous with the word "square" and in requiring frontage consents of a majority of the property owners in a block would ordinarily require frontage consents of the major portion of the property owners on the four streets surrounding the square.

As has been decided by the Supreme Court of Illinois in the case of *Harrison v. People*, 195 Ill. 466 as is set out on page 470 as follows:

"The word 'block,' as used in the ordinance, is synonymous with the word 'square,' and means the territory bounded by four streets. The word 'block' is defined by the Century Dictionary and Webster as 'a square or portion of a city enclosed by streets, whether occupied by buildings or not.'"

To the same effect is the *City of Chicago v. O'Hare*, 124 Ill. App. 290, page 297.

And also in *The People v. Griesbach*, 211 Ill. 35 on pages 36 and 37.

But under the article in the Chicago Code of 1911 concerning frontage consents, Section 711 defines the word 'block' as follows:

"Whenever a provision is made in this chapter that frontage consents shall be obtained for the erection, construction, alteration, enlargement or maintenance of any building or structure in any block, the word 'block,' so used, shall not be held to mean a square, but shall be held to embrace only that part of a street bounding the square, which lies between the two nearest intersecting streets, one on either side of the point at which such building or structure is to be erected, constructed, altered, enlarged or maintained, unless it shall be otherwise specifically provided."

And our Supreme Court in a later case (*Patterson v. Johnson*, 214 Ill. 481) passing upon the matter of what constitutes a majority of property owners in a block and having the decision in *Harrison v. The People* before it says on page 492:

"Were it not for the proviso found in Section 49, 'that in determining whether two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, any building fronting upon another street and located upon a corner lot shall not be considered,' we would be disposed to place the same construction upon the word 'block' found in Section 49 as was placed upon the word 'block' in the ordinance construed in the *Harrison* case; but in the construction of said Section 49 it is our duty to give all parts of the section, including the proviso, full force and effect, and we are of the opinion said proviso limits the word 'block' as found in said section, to the street or avenue upon which said blacksmith shop will front after it is removed,—that is, to Sheffield avenue between Newport avenue and Addison street."

So in passing upon this question particular attention must be given to the definition of the word 'block' in said Section 711 of the Chicago Code of 1911, wherein it is stated that 'block' shall not be held to mean a square but shall be held to embrace only that part of a street bounding the square which lies between the two nearest intersecting streets.

The Century Dictionary defines "intersection" as follows:

- I. "To cut or divide into parts; lie or pass across;"
- II. "To cut into one another; meet and cross each other."

Words and Phrases, Vol. 4, page 3724 defines "intersection" as follows:

"In a charter of a railroad declaring that, if the road should intersect any highway, the company should restore it to its former condition, so as not to impair its usefulness, 'intersect' means to cross, literally, to cut into or between; and therefore, where the road ran across a turnpike, the traveled path of which was in some places changed to make room for the railroad, there was no intersection within the terms of the statute. *State v. New Haven & N. Co.*, 45 Conn. 331, 344."

Therefore, in considering this matter of what constitutes a block Argyle street has been disregarded and we are of the opinion that the space between Winnemac avenue and Ainslie street on Lincoln avenue is a business block and frontage consents for a blacksmith shop are unnecessary.

Respectfully submitted,

M. W. CAGNEY,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

MAY 3, 1913.

SENATOR EDWARD J. GLACKIN, Chicago.

Dear Sir:

In response to your request for tabulated figures which would be plain to any one desiring to compare the tax rates in the different towns of the City for the years 1911 and 1912 with what the proposed Consolidation Act would have made same in the year 1912, we submit a series of tables below which illustrate the points you ask about.

The rate of \$5.11 on the \$100.00 of assessed valuation, which we say is the rate for 1912 on the basis of the proposed

Consolidation Act, is in fact higher than it would actually be for the reasons, viz:

First: It can not be assumed that because the city's taxing power is increased to a maximum of \$2.00, which allows some latitude, it would necessarily follow that the city will consume the full \$2.00 by making a levy for that amount.

Second: In case the city does increase its levies beyond what was heretofore required for city and park purposes, thereby consuming some or all of the additional taxing power granted under the proposed act, it follows necessarily that the County and Sanitary District taxes must be reduced a little, because the Juul Law will still be operative as to those taxing bodies—and consequently, as the city and parks increase their tax, the aggregate to be scaled will be higher and the percentage of reduction for County and Sanitary District will be greater.

It will thus be seen that the total of \$5.11 would necessarily be reduced a few cents even if the city should consume the entire \$2.00 allowed under the proposed act.

We also call your attention to the fact that in this \$5.11 there is an increased rate of 3 cents in the State's tax, which for purposes of comparison ought to be stricken off leaving the rate to be compared \$5.08 instead of \$5.11.

We, therefore, present figures below which put a far worse aspect on the revenue feature of the proposed act than would actually exist. We do this because we desire to base our comparison on figures that can not be disputed without strengthening our position. We are certain that it can be satisfactorily shown to any one who makes the necessary tabulation that the rate for 1912, under the proposed act, even in the towns of South Chicago, Hyde Park and Lake, would have been lower than the rate for 1911, although the figures in our tables indicate a slight increase.

The tables are as follows:

Town of West Chicago:

1911.

State	\$0.35
County	.56
City, general and bonds (including Lib. & Tub. San.)	1.50
Schools	1.44
Sanitary Dist.	.71
Park	.76
Boulevard and Park	.05

 \$5.37

1912.

State	.38
County	.52
City	1.24
Schools	1.39
Sanitary District	.49
Park	.69

 \$4.71

For the year 1912 on basis of rate in proposed Consolidation Act, which would be the same in all parts of the city:

State	.38
County	.52
City and Park	2.00
City bonds	.33
Schools	1.39
Sanitary District	.49

 \$5.11

This rate is 26 cents lower than paid in 1911.

Town of South Chicago, Town of Hyde Park
and Town of Lake:

1911.

State	.35
County	.56
City	1.50
Schools	1.44
Sanitary District	.71
Park	.48

 \$5.04

1912.

State	.38
County	.52
City	1.24
Schools	1.39
Sanitary District	.49
Park	.38

 \$4.40

The rate in 1912 on basis of proposed Consolidation Act would be 7 cents higher than paid in 1911.

Town of North Chicago:

1911.

State	.35
County	.56
Town	.12
City	1.50
Schools	1.44
Sanitary District	.71
Park	.42
Lincoln Park Board	.08
Lake Shore Protection	.01

 \$5.19

1912.

State	.38
County	.52
Town	.12
City	1.24
Schools	1.39
Sanitary District	.49
Park	.41
Lincoln Park Board	.07
Lake Shore Protection	.01

 \$4.63

The rate in 1912 on basis of proposed Consolidation Act would be 8 cents lower.

Town of Lake View:

1911.

State	.35
County	.56
Town	.11
City	1.50
Schools	1.44
Sanitary District	.71
Park	.58
Lincoln Park Board	.08

 \$5.33

1912.

State	.38
County	.52
Town	.11
City	1.24
Schools	1.39
Sanitary District	.49
Park	.49
Lincoln Park Board	.07

 \$4.69

The rate in 1912 on basis of proposed Consolidation Act would be 22 cents lower than paid in 1911.

Town of Jefferson:

1911.

State	.35
County	.56
City	1.50
Schools	1.44
Sanitary District	.71

 \$4.56

1912.

State	.38
County	.52
City	1.24
Schools	1.39
Sanitary District	.49
Park	.19

 \$4.21

The rate in 1912 on basis of proposed Consolidation Act would be 55 cents higher than paid in 1911. This is due to the fact that the Town of Jefferson has no town tax and in 1911 had no park tax whatever. Since then they have incorporated small park districts and pay a small park tax. If this 19 cents which they now pay for park purposes had been paid in 1911 the increase under the proposed act would be only 36 cents instead of 55 cents.

From the above it will be seen that while the rates are necessarily higher under the proposed act than they were in 1912, when the city was crippled by a reduced rate that could not be made permanent without reducing the standard of municipal government now maintained, yet as compared to 1911 they are lower.

The proposed Consolidation Act, without taking into consideration any saving that would be effected, or any reduction such as would necessarily result in the taxes of the county and Sanitary District if the city tax was increased, and assuming that the city would levy the limit of 2 per cent., would operate so that there would be an actual saving in all parts of the city except the Town of Jefferson, in which town they did not pay a park tax until they incorporated a small park system in 1912.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 5, 1913.

HON. JOHN MCWEENY, General Superintendent of Police.

Dear Sir:

Your letter of March 14th, 1913, addressed to the Corporation Counsel, has been handed me for reply.

It is my understanding, gathered from the contents of said letter, that various motor livery establishments are now employing chauffeurs running public conveyances whose hours of employment are so many that through the stress of work they may become fatigued and unfit for their vocations and

a menace to the safety of the public traveling in such conveyances or using our streets and thoroughfares. You request an opinion as to whether an ordinance can be passed to regulate the hours of employment of such chauffeurs.

This is indeed a difficult question and at first blush would seem to be a matter of state legislation. But, after full consideration, I am inclined to the belief that an ordinance reasonably regulating the hours of employment of public chauffeurs would be sustained by our courts.

As to the right of the State to enact such legislation, it may be claimed that it is contrary to the fourteenth amendment of the Constitution of the United States in that it deprives citizens of the right to enter into contractual relations as they see fit, and it may be urged that such legislation is not a valid exercise of the police power. These various objections are serious ones and it is hard to say how far our courts will go in this case. Both the United States Supreme Court and the Supreme Court of Illinois have sustained the right of the State to regulate the number of hours that *women* shall be employed in laundries and factories, on the theory that the state has an interest in the health of women as affecting their progeny.

Miller v. Oregon, 208 U. S. 412.

Ritchie v. Wayman, 244 Ill. 509.

People v. Eldering, 254 Ill. 579.

It is also fairly well settled that the state has the right to limit hours of employment of workingmen to eight hours in mines, "except where life and property is in imminent danger."

Holden v. Hardy, 169 U. S. 366.

Ex Parte Martin, 106 Pac. 236; 26 L. R. A. N. S. 242.

The right of the state to regulate hours of employment of railroad employes is no longer questioned.

State v. N. P. R. R. Co., 15 L. R. A. N. S. 134.

State v. C. M. & St. P. R. R. Co., 136 Wis. 407.

The right of a state to enact a law regulating the hours of employment of men in bakeries was denied in *Lochner v. New York*, 198 U. S. 45.

This latter case is a most interesting summary of the various decisions with reference to the question here involved. The court takes the view that the regulating of the number of hours that bakers should be employed is not one affecting the public at large and consequently does not come within the other decisions above mentioned. The gist of this decision is that the hours of employment of men may be regulated where the public is affected. . This is now conceded to be the law, and as applied to this question I would say that since the employment referred to does affect the public it may be so regulated.

In the above case, the court, at page 53, states as follows:

“The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment.”

From the above it appears quite clear that a statute regulating the hours of chauffeurs would be a legitimate exercise of the right of the state to protect the public safety.

We now come to the question whether the city has been delegated the power by the state to enact an ordinance which would accomplish the same thing.

The power to license chauffeurs was sustained in the case of *City v. Kluever*, 257 Ill. 317, which is an interesting decision on the question of delegated powers with reference to automobiles, chauffeurs, etc.

In the Kluever case, *supra*, the court, at page 324, says:

“If any subject can be conceived of which requires the exercise of the powers assumed by this ordinance for the safety of the public it is the ascertainment of the qualifications and fitness of operators of automobiles and other motor vehicles driven through the streets of a city like Chicago. These ponderous vehicles, driven by powerful engines, are a menace to the public safety unless managed and driven by persons who are competent and qualified to operate them. * * * Careless and incompetent operators endanger the public safety, and with another class the tooting of the horn is a warning to get off the highway or street, directed to the citizen for whose use it was originally laid out. Naturally enough, there

has been a great loss of life on the public streets because of these vehicles, and very frequently in the darkness and excitement or tumult the operator has escaped. Everyone knows the dangers of the operation of these machines on the public streets, and especially in a metropolitan city, when the streets and crossings are thronged with citizens."

From the standpoint of the people on the streets, therefore, it would add to the safety of the public to limit the hours of labor of chauffeurs, and as for that part of the public which rides in such conveyances, they have the same right to protection at the hands of such common carriers as if they were riding on railroads. Among the most important things to be done in their behalf is to furnish a competent chauffeur who is not over-tired.

The city has the right to legislate with reference to the subject-matter hereof under the forty-second provision of Article V, Section 1 of the Cities and Villages Act, which reads as follows:

"To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, expressmen, and all others pursuing like occupations, and to prescribe their compensation."

Considering, therefore, the safety of the public while using the streets and thoroughfares and also the safety of the passengers conveyed by these motor vehicles acting in the capacity of public carriers, it is my opinion that the city would have the right to enact the suggested regulation. If it is your desire to have such an ordinance drafted, we will prepare same.

This conclusion coincides with an opinion of Maclay Hoyne, Assistant Corp. Counsel, dated March 15, 1904. (p. 789 Ops.)

Respectfully yours,

LOUIS SALINGER,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

MAY 5, 1913.

HON. JAMES DONAHOE, Chairman, Committee on Judiciary,
State Legislation, Elections and Rules.

Dear Sir:

You have asked this department for an opinion concerning the ordinance prescribing the times and places of the meeting of the City Council, which is now pending before that body. It seems that this has always heretofore been fixed by the rules and that no ordinance was ever passed on the subject, except at such times when it was necessary to change the regular time of meeting.

While this practice would not result in rendering any action taken at such meetings from being invalid, still there is no doubt that the better practice is to have the times and places of meeting fixed by ordinance rather than by rules which are adopted by resolutions.

The statute (Cities and Villages Act, Article III, §9) reads as follows:

“The city council may prescribe, by ordinance, the times and places of the meeting thereof, and the manner in which special meetings thereof may be called.”

The change is really a matter of form rather than of substance, but we regard it as a proper one to make.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 6, 1913.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

Pursuant to your request we transmit herewith draft of an ordinance amending Section 1107 of the Chicago Code of 1911 relating to hours during which bridges shall remain closed. We have changed the ordinance as it now appears in the Chicago Code in the following particulars.

1st. The periods during which the bridges shall remain closed, as specified in Clause 1 of said Section 1107, have been changed to the periods from 6:30 a. m. to 9:00 a. m. and from 4:30 p. m. to 7:00 p. m.

2nd. The exception in Clause 1, providing that certain bridges shall be opened to admit the passage of passenger boats one-half hour earlier in the evening, is limited under the proposed ordinance to the bridge at Rush street only.

3rd. We have included in the proposed ordinance a provision that no bridge coming within the classification of Clause 1 shall be opened between the hours of 6:00 a. m. and 10:00 p. m. to permit the passage of any pile driver, derrick, dredge, spring heel, house boat, coal hoist or any other vessel, craft or float not carrying passengers or freight as commonly understood.

The power of the city to enact ordinances requiring bridges to remain closed during certain periods of the day was passed on in the cases of *Escanaba Company v. Chicago*, 107 U. S. 678. In this case the court had under consideration an ordinance in many respects similar to Section 1107 of our Code. The court held that while municipal and state regulations concerning navigation must yield to Federal regulation in case of conflict, nevertheless until Congress has acted on the subject the power of the state and municipality over bridges across its navigable streams is plenary and complete.

To the same effect, see, also:

Wilson v. Black Bird Creek Marsh Co., 2 Peters 245.

Gillman v. Philadelphia, 3 Wall. 713.

Illinois River Packet Co. v. Peoria Bridge Assn., 38 Ill. 468.

City of Chicago v. McGinn, 51 Ill. 266.

Yours very truly,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

MAY 9, 1913.

BOARD OF TRUSTEES, Police Pension Fund, Chicago, Ill.

Gentlemen:

The petitioners are members of the Police Department of the City of Chicago employed in the capacity of police operators.

Prior to the year 1913, the Police Department, as well as your Board, held that their duties were such that they could not be classified as members of the police force of the City of Chicago, or as policemen.

On December 30, 1912, the City Council passed an ordinance which, in effect, reorganized the Police Department and designated police operators along with other members of the department as "policemen." Thereby the City Council imposed the statutory duties of policemen upon police operators, which they were theretofore not obligated by law to perform.

Section 3 of the Police Pension Act provides as follows:

"Whenever any person shall have been, or shall hereafter be appointed and sworn either as a probationary or regular policeman, and shall have served for a period of twenty years or more in the police department of such city, * * * said Board shall order and direct that such person after his service in such police department shall have ceased, shall be paid a yearly pension, etc."

All of the police operators were recently sworn in as policemen and became beneficiaries of the Pension Act. The question arises whether they are entitled to credit for the time they served in the Police Department prior to the passage of the police reorganization ordinance. In view of the language of Section 3 of the Act, we cannot avoid the conclusion that they are entitled to such credit.

The Act does not provide that a person shall have served in the Department of Police as a policeman for twenty years before he shall become entitled to be retired with a pension, but provides only that if at any time during his service in the department he is sworn in either as a probationary or regular policeman and has served twenty years in the Police Department in any capacity, he shall be entitled to a pension.

We are of the opinion that the Board of Trustees has power to accept the offer made by the police operators.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

MAY 9, 1913.

BOARD OF TRUSTEES of the Police Pension Fund of the City of Chicago.

Gentlemen:

There has been referred to me by your clerk the application for a pension of Mary Matthews, widow of William H. Matthews, patrolman 45th Precinct, who died on the 28th day of March, 1913.

The deceased officer had served seventeen years and nine days and under the law his widow will be entitled to a pension, if in fact she is his widow. From the documents before me I find that Mary Matthews affirms under oath that she was married to the deceased about the 15th day of September, 1892, by a minister or some other official legally authorized to perform the marriage ceremony in some town in the State of Minnesota.

Your clerk informs me that from a search of the records of the Bureau of Vital Statistics he ascertains that a former wife of William H. Matthews died in 1893, so that it is apparent that at the time of the supposed second marriage of Matthews he already had a wife living and there is no evidence before me that he had obtained a divorce from the first wife before his marriage to the second. If this be the case the second marriage was void.

The question then arises, what was the status of the second wife during the life of Matthews and what is her status now as a pensionable widow under the law? By the statute of Illinois, passed in 1907, abrogating the effect of common law marriages, the provisions of the statute are only prospective in their operation and would not affect a status cre-

ated prior to 1907, so that we must look to the law and the decisions of the court prior to that date for light on the subject.

Under the decisions of this state where a man and woman live together holding each other out to the world as husband and wife, a so-called common law marriage results and the effect of such marriage, as far as the rights, duties and obligations of each toward the other are concerned, are no different than if the parties had complied with all the provisions of the statute relating to marriage.

The case of *Robinson v. Ruprecht*, 191 Ill. 424, holds that while the presumption is that a cohabitation which was meretricious in its inception continues to be so, yet it may be shown by proof, either direct or circumstantial, that the cohabitation has lost its wrongful character and become matrimonial in intent. A common law marriage valid in this state is established where, although at the time of the celebration of the supposed marriage the man knew that he had a legal wife living, the parties continued to cohabit as husband and wife, publicly conducting and announcing themselves as such and acknowledging their offspring as their children.

The case of *Manning v. Spruck*, 199 Ill. 447, is conformatory with the doctrine above mentioned.

The evidence in this case shows that Mrs. Matthews had been known by the pastor of St. Vincent's Catholic Church for a number of years prior to her husband's death and for seven years prior to April 5, 1913, had been received into the Catholic Church. Affidavits on file show that affiants were acquainted with Mary Matthews for almost twenty years and that Mary Matthews lived with William H. Matthews as his wife during that period. A number of children were born to William H. Matthews and Mary Matthews during the time they lived together as husband and wife.

From the evidence before me I think there can be no doubt that whatever the character of the relation between these parties in its inception, it has been matrimonial in its intent for twenty years; that Matthews acknowledged Mary Matthews to the world as his lawful wife and that she was so regarded by the authorities of the church and by their neigh-

bors generally; that the children born to them were acknowledged publicly as their legitimate children, springing from a lawful union.

Under these circumstances I think there can be no doubt that the applicant is to be regarded in the eyes of the law as the common law widow of William H. Matthews, deceased.

I am, therefore, of the opinion that the applicant is entitled under the law to a pension.

Yours very respectfully,

JOHN W. BECKWITH,
Acting Corporation Counsel.

MAY 9, 1913.

THE BOARD OF TRUSTEES of the Police Pension Fund, Chicago.
Gentlemen:

The papers submitted with the above entitled application show that Charles H. Walker, the deceased husband of the applicant, prior to his death, was retired by your board and was receiving a pension on account of physical disability suffered by him while in the service and in consequence of police duty.

The Police Pension Act makes no provision for pensioning the widow of a deceased pensioner retired on account of physical disability.

The only provision made for the benefit of the widow of a deceased policeman are:

1. If the deceased was in his life time retired with a pension after twenty years' service.
2. If he lost his life while in the performance of police duty or from injuries received while in the performance of such duty.
3. If he died after ten years' service and while still in the service.

At the time of his death, Charles H. Walker, according to the records transmitted, had served only seventeen years in the department. His death did not result from the injuries which he received while in the performance of his duty, according to the certificates of the physicians attached to the application. It appears from these certificates that Mr. Walker

died of heart trouble due to old age. Nor was the deceased at the time of his death in the service of the city, he having been retired on account of disability. We are, therefore, of the opinion that the applicant is not entitled to a pension.

Yours respectfully,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON.

Corporation Counsel.

MAY 9, 1913.

HON. WILLIAM D. CASSIDY, Clerk Municipal Pension Fund.

Dear Sir:

It appears that D. A. Salvia is a junior clerk employed by the Board of Education. After having contributed to the Municipal Pension Fund of Chicago for eighteen months he desires to withdraw as a beneficiary of said fund and become a participant of the Public School Employes Pension Fund.

Section 1 of the Act creating the Municipal Pension Fund provides that it shall not apply "to any employe * * * now or *hereafter* participating in any other municipal pension fund."

If but for the fact that he is now contributing to the Municipal Pension Fund, Mr. Salvia would be entitled to become a beneficiary of the Public School Employe's Fund, he may now elect to do so and as soon as he shall have become a participant of that fund the Act creating the Municipal Pension Fund, by its terms, will no longer be applicable to him.

Yours respectfully,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 9, 1913.

HON. JOHN MCWEENEY, General Superintendent of Police.

Dear Sir:

Acting Chief of Police Herman F. Scheuttler, a short time ago turned over to this department a framed instrument purporting to be a membership certificate in the "Merchants, Manufacturers & Bankers Protective Association."

The alleged certificate was printed in colors with a gold seal and ribbon attached, and with a fac simile of a detective agency license in the lower right hand corner. This license has a picture of the City Hall and the words "By authority of the City of Chicago" to the right of same. The certificate has the word "warning" in red letters near the head, and then follows wording to the effect that the holder is a member of the association and is entitled to protection against "thefts by employes or public, swindling schemes, fraud, bad debtors, etc."; also that all perpetrators of such crimes would be vigorously prosecuted by the association's ablest detectives and attorneys. There is also a statement in the body of the certificate to the effect that a member of the association is entitled to the privilege of consultation and advice, legal and otherwise, for one year.

Along with the framed certificate mentioned above, Acting Chief Scheuttler turned over to us an affidavit signed by Mrs. Mae Gregory. From this affidavit it appears that Mrs. Gregory keeps a hotel at 640 E. 39th street; that on April 19, 1913, two men in citizen's dress appeared and one of them showed a star and said they were sent to all the hotels in the city for the purpose of taking orders for membership certificates for a protective association; that when an order was refused, these men went away, but later on a man in uniform, with belt and star and brass buttons on his coat and apparently a police officer, came to the same place with three so-called membership certificates, as above described, and declared he would not leave until he got \$5.00 for one of them. When he was told that it was not ordered and would not be ordered, he said, "You have got to take it." Thereupon the affiant taking him to be a police officer and thinking she was compelled to take the certificate paid \$5.00 for same,

and received a receipt for the money, and the certificate which was sent to this department.

You inquire, first, whether the detective license issued to the association that is doing business in this manner may be revoked on account of the conduct of the licensee, and you ask whether the improper use of the certificate may be stopped by arrest.

There is no doubt about the fact that a fraud is being perpetrated on owners of hotels and other places by means of the scheme outlined in the affidavit. The so-called certificate in itself practically establishes this. It pretends to give "protection", and is gotten up in such a way as to impress the person receiving same with the idea that there is some connection between the association and the city government. One name appearing on same purports to be the name of the "Chief of Detectives."

There is no guarantee or promise to the holder of the certificate except advice. While this privilege of consultation and advice may have the effect of avoiding prosecution for certain offenses which would otherwise lie, the appearance of the certificate coupled with the affidavit lays bare a palpable fraud.

So far as the revocation of the license is concerned, there is no doubt about the right of the Mayor to do so. Section 758 of the Chicago Code expressly gives him this right. He can not revoke such license without something before him indicating that the licensees are unfit to act in the capacity of detectives, but if his attention is called to such a state of affairs as exists in the present instance, he may revoke the right to conduct such business, and such exercise of his discretion can not be questioned.

With regard to the propriety of arresting a person selling these certificates in an improper manner, there are several laws which can be invoked that would authorize an arrest.

Section 1948 of the Chicago Code, which makes it an offense to wear a police uniform or police badge or pretend to be a policeman, will reach any person who flashes a star or is in a uniform that looks like a police uniform even though there be a shade of difference in detail.

If the star or badge used, or the uniform, is similar in appearance to the police badges or uniforms, the offense is complete. Prosecution under any of the criminal statutes would depend altogether on how cleverly or poorly the scheme is worked. It is quite likely that the person selling these certificates ordinarily does not say anything that would render him liable for prosecution for obtaining money under false pretenses, or operating a confidence game, or working a black-mailing scheme.

At the same time, if words are used which might indicate that the proprietor of a hotel or the keeper of a resort would be prosecuted if he failed to purchase one of the certificates, then a criminal action would lie under Section 93 of the Criminal Code.

It is more than likely that each case would have to stand on the particular circumstances that transpired at the time of the sale of the certificate. No general rule for prosecutions can be laid down, except as indicated above; and moreover, if the selling is cleverly done, without resort to the exhibition of stars and uniforms, there can be no prosecution whatever, since there is at least a pretext of giving something for the money when it is stipulated in the certificate that the proprietor is entitled to consultation and legal advice for one year.

We return herewith the framed certificate and the affidavit of Mrs. Gregory.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 9, 1913.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

In answer to the communication of H. H. Evans, Esq., Secretary to your committee, of the 1st inst., which contains

copy of council order relative to the inadequacy of suburban passenger service furnished by steam railroad companies generally and the Chicago, Rock Island and Pacific Railroad Company in particular and how to remedy such conditions, we desire to call attention to the fact that with few exceptions jurisdiction over steam railroads within the state is vested in the Railroad and Warehouse Commission.

The act entitled "An Act in relation to fencing and operating railroads" (approved March 31, 1874; in force July 1, 1874), contains numerous provisions with reference to the subject matter of the order before your committee.

Section 24 of said act vests jurisdiction in the corporate authorities of cities, towns and villages, to regulate the speed of trains within the respective municipalities, "provided, that no such ordinance shall limit the rate of speed, in case of passenger trains to less than ten miles per hour, nor in any other case to less than six miles per hour."

Other provisions relate to fencing the right of way, flagmen at crossings, approaches at crossings, ringing of bell and whistling at a distance of eighty rods from intersection of street crossing, maintenance and repair of crossings and approaches, etc.

Paragraphs 25, 26 and 27 of Section 1 of Article 6 of the Cities and Villages Act contain the provisions which may be enforced against railroads by the corporate authorities of cities and villages.

None of them touch upon the subject under discussion, namely, adequacy of service.

Sections 2183 and 2214, of The Chicago Code of 1911 provide how railroads may operate within the city. These sections are to be construed as an exercise of the city's police power within the limitations provided by statute.

Section 19 of the ordinance of July 9, 1894, which provides for the elevation of the tracks of the Chicago, Rock Island and Pacific Railroad Company, expressly relieves said company from observing the provisions of the ordinances relating to the speed of trains, the giving of signals, the maintenance of gates, flagmen, watchmen, signals and signal towers, after such elevation is completed.

It will be observed from the foregoing that the City Council does not possess the very powers of regulation which appear necessary to remedy the conditions complained of.

For this reason we have not deemed it pertinent to investigate the legislation in other states as requested by your communication. In this matter we are dealing with local conditions which are evidently the result of a want of authority in the local authorities.

The true remedy in our opinion would be by the passage of a law which confers upon the City Council in clear and unmistakable terms the power to regulate all agencies of transportation within the limits of the city, including steam railroads doing a suburban passenger business.

Such a law should leave through traffic to those agencies of government which are vested with the requisite power to handle the subject, but should confer upon the local authorities exclusive power to regulate that part of the business of steam railroads which consists in operating passenger trains exclusively for the conveyance of passengers from one point in the city to another.

According to the provisions of the Act of 1871 to establish a Board of Railroad and Warehouse Commissioners, and prescribe their powers and duties, as amended in 1911 (Section 30 of said Act; Hurd's Rev. Stat. 1911, Section 185K, page 1855), said commission possesses the following powers:

“The commission shall have power and authority to inquire into the business management of all common carriers, their passenger and freight rates, distribution of cars, granting of sidings, location of passenger and freight stations, use of and compensation for cars owned or controlled by them, the relations of such carriers to the public; and of the public and public corporations to common carriers; the inter-relation between such common carriers, in so far as any such subject so to be inquired into shall affect or have any bearing upon the transportation of persons or property between points wholly within the State of Illinois; and the commission shall have power to make and enforce such orders as will secure the safety and accommodation of the persons and property being transported by common carriers and as will prevent unnecessary or unreasonable obstruction

to or interference with the tracks, yards, locomotives and cars of common carriers.”

For the better information of your Committee we desire to advise you that a bill for an act granting such powers of regulation to cities is now pending before the General Assembly. The bill in question was prepared by this department and is known as the General Utilities Act.

Very truly yours,

NICHOLAS MICHELS.

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Asst. Corporation Counsel.

MAY 12, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Replying to your inquiry as to manner of appointing the Board of Directors of the Municipal Tuberculosis Sanitarium, we have the honor to advise you that the act provides for the appointment of a Board of three directors by the Mayor with the approval of the City Council. One of the directors must be appointed from the Board of Health of the city; the other two from the citizens at large. One-third of said directors hold office for one year; one-third for two years, and one-third for three years from the first of July following their appointments. Upon the expiration of their respective terms the Mayor is required to appoint one director to take the place of the retiring director to hold office for three years and until his successor is appointed. Such appointment must be made annually before the first of July of each year. Vacancies in the Board of Directors are filled in like manner as original appointments. No bond is required of appointees.

Yours respectfully,

LOUIS SALINGER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 13, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

The question of the inspection of canopies has been referred to the Corporation Counsel by you for an opinion.

As we understand the matter, it is the desire of the Commissioner of Public Works to have an annual inspection made of canopies over the streets and attached to buildings, for the maintenance of which special permits have been given by the city. The question arises whether under the ordinances there is any authority for this inspection to be made by the Building Department.

Section 601 of The Chicago Code of 1911, as amended, provides among other things, that a permit shall be issued by the Commissioner of Public Works for the maintenance of a canopy, the plans of which canopy must be submitted to the Commissioner of Buildings for approval, and that "no permit shall be issued unless the plans of such canopies shall be approved by the Department of Buildings."

As we read this provision, it was manifestly the intention to have the Building Department ascertain whether these canopies are so constructed as to insure safety to the public in general, and for that reason no permit should be issued without the consent of said Building Commissioner. This would seem to me to be an expression of the Council of its desire to place the matter of inspection under the jurisdiction of the Department of Buildings, if such inspection is to be made.

Section 237 of The Chicago Code of 1911 relating to annual inspection of buildings, reads as follows:

"* * * (a) The commissioner of buildings and his assistants shall make an annual inspection of all theatres and places of amusement, worship, instruction or entertainment, *and also of all other buildings over two stories in height, except, etc.* * * *

"(b) Whenever any such inspection shows the building to be in compliance with the requirements of *this chapter* with respect to stairways, means of egress, *and in all other respects*, it shall be the duty of the commissioner of buildings to issue, or cause to be issued, a certificate setting forth the result of such inspection, con-

taining the date thereof, and a statement to the effect that such building complies in all respects with the provisions of this chapter, upon the payment of the inspection fee herein required."

Since Section 601 relates to canopies and is a part of Chapter 16 with reference to buildings, it is my opinion after considering Section 237 in connection with the other provisions of Chapter 16, that it becomes the duty of the Commissioner of Buildings to inspect the canopies, as well as other parts of said buildings, at his annual inspection.

If, after such inspection, the canopy shall be found unsafe, and the owner shall refuse to comply with the requirements of the Commissioner of Buildings with reference thereto, the license given to said owner to maintain such canopy may be revoked.

Dillon on Municipal Corporations, 5th Ed., Sec. 1886.

Hibbard v. Chicago, 173 Ill. 91.

People v. Harris, 203 Ill. 272.

Respectfully submitted,

LOUIS SALINGER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 19, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In compliance with your request for an opinion as to whether the location of the proposed saloon mentioned in the caption hereof is within two hundred fifty feet of Trinity Church, we beg to say:

The location of the proposed saloon is at the southeast corner of East 26th street and Indiana avenue. Trinity Church is located at the southeast corner of South Michigan avenue and East 26th street.

Objection has been made to the granting of the license on the ground that the location of the proposed saloon would be within two hundred fifty feet of said church.

It appears from the plat hereto attached made by the map department, the report hereto attached of investigator George J. Teeling connected with this department and from the communication hereto attached from the Reverend Dr. John M. McGann, Rector of Trinity Church, that the church fronts on and has its main entrance on Michigan avenue; that it has a side entrance on East 26th street and that connected with and adjoining that portion of the building, which we will for convenience hereinafter refer to as the church building, is the parish house or church hall. The parish house has a frontage of about fifty feet on East 26th street with a depth of about one hundred feet.

This department has heretofore given opinions to the effect that in measuring the distance between a church and saloon the measurement should be made along the shortest feasible way of passage from the nearest door of the church to the nearest door of the saloon. As shown by the attached plat the distance between the side entrance of the church building on 26th street (which is the entrance nearest to the proposed saloon) and the entrance to the saloon is two hundred sixty-eight feet, and that the distance between the entrance to the parish house and the entrance to the proposed saloon is two hundred ten feet.

It is therefore apparent that the decision of the question as to whether the proposed saloon will be within two hundred fifty feet of the church depends upon whether the measurement should be made between the 26th street entrance to the church building and the entrance to the proposed saloon or between the parish house entrance and the entrance to the proposed saloon.

It therefore becomes necessary to determine whether for the purpose of the regulation above mentioned the parish house is to be deemed a church, or a part of the church in question.

The roof of the parish house is gabled so that from the exterior it gives the impression of a distinct building. The parish house has three floors or stories. Certain rooms on the first floor are used for Sunday School classes on Sunday and for social entertainments and lectures on certain week day

evenings. Part of the second floor is used for a restaurant or lunch room where several hundred young women of the neighborhood are served daily with a luncheon for fifteen cents each. This charge is said to cover only the expenses of the lunch room and kitchen connected therewith. Part of the second floor is used as a work room by the ladies of the parish on four days of the week. The Rector and his Secretary and the Assistant Rector have their offices on this floor. The front part of the third floor is fitted up as a pool room, having three pool tables and accessories which are used without charge by the young men's social club of the church. The rear part of the third floor is fitted up and used as a gymnasium.

It is manifest that the term "church" for the purposes of the two hundred fifty foot rule refers to the building or edifice.

The Century Dictionary defines a "church" to be: "1. An edifice or a place of assemblage specifically set apart for Christian worship. 2. An edifice dedicated to any other kind of religious worship; A temple (rare)."

Bouvier's Law Dictionary defines a "church" to be: "A society of persons who profess the Christian religion. The place where such persons regularly assemble for worship."

The modern church has in many instances, particularly in large cities, extended its activities beyond that of public worship. Much social, educational and so-called institutional work has been undertaken and prosecuted with most gratifying and beneficial results. It is generally recognized, however, that such lines of service, while undertaken chiefly for the ultimate purpose of bringing the beneficiaries thereof under the religious influences of the church would in many respects constitute a separate field from the distinctively religious services of the church.

The style of building adapted to public worship is not adapted to the class of work above referred to and consequently it has been recognized as desirable to have a separate building or quarters provided therefor and in many instances guild houses, parish houses, church halls and similarly designated buildings have been erected where the social, educational

and institutional work of the church may be effectively carried on. In the case under consideration all of these activities have been gathered into the parish house which is especially adapted thereto.

The church building proper is in the usual style of church architecture and is designed for religious worship and it would be practically impossible to conduct therein the kind of work which is being conducted in the parish house.

In the adoption of the two hundred fifty foot rule consideration was possibly given to the recognized right of persons, engaged in the public worship of God, funerals and like services which are ordinarily held in church buildings, to be free from the disturbances which might result from the near proximity of a saloon. Our state legislature early recognized this right of the people to have peace and quiet while engaged in public worship by enacting a law, which is still in force, making it a misdemeanor for any person by disorderly conduct to interrupt or disturb "any assemblage of people met for the worship of God."

The occasion for peace and quiet which applies to a place of public worship is not present in the case of a building which though connected with a church is used mainly for the purposes above detailed which cannot be considered as public worship.

It will be remembered that we are not now dealing with the question of the propriety of having the two hundred fifty feet restriction applied to places other than churches. We must apply the rule as it is. In the foregoing paragraphs we merely suggest a consideration which may have moved the authorities to have the rule apply to churches and not to parish houses.

We have not lost sight of the fact that a Sunday School is conducted on Sunday in the parish house. The character of the building, however, must be determined by the uses to which it is chiefly devoted. A building intended to be used as a church and used chiefly for purposes of worship would be deemed a church notwithstanding it was occasionally used for some non-religious or secular purpose. Likewise, the fact that a Sunday School is conducted in this parish house

and possibly other religious services are held there, does not constitute the building a church when the other uses to which the building is devoted and the fact that the public worship is held in the adjoining church building which is especially set apart for and devoted to that purpose are taken into consideration.

We are, therefore, of the opinion that under the existing circumstances the measurement should not be made from the parish house door, but should be made from the East 26th street entrance to the church building, which entrance as shown by the attached plat is two hundred sixty-eight feet from the entrance to the proposed saloon.

Yours very truly,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 21, 1913.

HON. EUGENE BLOCK, Chairman, Commission on Local Transportation.

Dear Sir:

Pursuant to the direction of your committee, I have examined the draft of an ordinance for through routing the trains of the various elevated railroad companies now using and maintaining the union loop.

The draft submitted to me was stated by counsel for the elevated companies at the last meeting of your committee to be merely tentative in form, and subject to any amendment, as to form at least, which might be desired by your committee or the corporation counsel. For this reason I have embodied my conclusions upon the subject in the form of suggestions which may be embodied by the companies in a re-draft of certain sections, and I have not attempted to re-draft such sections myself.

Section 1. I consider this section unobjectionable in form, and make no comment thereon.

Section 2. This section authorizes the companies to con-

struct "such longitudinal extensions of the platforms at each of the stations now located on the union loop as may be necessary to accommodate two trains of six cars each." I think the length of these platforms should be definitely stated or a limitation placed upon their length which could not be exceeded.

The permission to construct "all necessary railings and other appurtenances for the proper use of such extended platforms, etc.," I think should be limited by reference to plans, details and specifications to be filed with the Commissioner of Public Works. The section as it now stands is a little too broad.

Section 3. The same observations made in Section 2, with reference to the advisability of having the construction conform with specific plans on file with Commissioner of Public Works, apply to Section 3. The structural details of this section should be gone over with and approved by the Commissioner of Public Works before this section is adopted.

Section 4. This section presents engineering features which should be passed upon by competent authority.

Section 5. The length of the platforms should be specifically limited in this section to a given number of feet.

Section 6. The authority given by this section is too broad, and should be limited by reference to specific plans on file with the Commissioner of Public Works. The length of the platforms, as extended on Lake street, should be definitely stated, and the engineering necessities of the change contemplated by this section should be investigated.

Section 7. The language of this section should be made more definite as to the point in the street at which connections are to be made, and reference should be made to plans on file. The authorization in the last four lines of the section is entirely too broad.

Section 8. If I am correct in assuming that the portion of the structure referred to in this section is located on Lake street, then the original frontage consent petitions of this particular company should be inquired into for the purpose of ascertaining whether the petitions were for a site for a road with two tracks only. Where property owners have pe-

tioned for a two-track road it is doubtful whether such petition would authorize the subsequent construction of a third track.

Section 9. Not only should this section provide that all plans and specifications must be first submitted to, and approved by, the Commissioner of Public Works and all work done under his supervision, but there should also be added language indicating that the work should be done to his entire satisfaction; in other words, the Commissioner might be furnished with plans and approve them, and supervise the work, and yet have no power to stop the work if it is not going on in accordance with his ideas of proper construction. With the vast experience of the Commissioner of Public Works in supervising construction of this character he will doubtless have some valuable suggestions as to how far the plans submitted to him should go in detail and be unalterable, and how far, on the other hand, some discretion might safely be lodged in him to permit necessary alterations and changes.

Section 10. This section is entirely novel in all of the elevated railroad ordinances in this city, and quite ungermane to the subject-matter of through routing. Whether the privilege of using the station for commercial purposes is a legitimate incident to a grant of track rights in the street, is a question of some little doubt, but I can see no propriety in foreclosing the city's right in this respect if it chooses to grant this privilege. With respect to the grant of authority to use its cars for advertising, I see no legal objection to this and it is purely a matter of policy to be determined upon by the City Council.

Section 11. I am of the opinion that language should be inserted in this section making compulsory upon the companies the giving of comfortable and adequate service to the public, and also a provision requiring the precedent consent of the council or some city official to the particular through routes; in other words, the company ought not to through route its cars according to its own notion entirely, but some supervision by the city should be provided for.

Section 12. I am of the opinion that as to this section

some supervisory power upon the through routing and the operation of trains in a general way to secure ample accommodation to the public should be provided for in this section. The provision for universal transfers in this section it may be stated is one which in our opinion the companies are obliged to make under the present ordinances taken in connection with their present unified operation and control and can properly not be considered as any concessions extended to the city or the public; in other words, the companies are simply offering what the city is now in process of enforcing.

Section 13. This clause which is designed to prevent this grant being used by the railroad company as evidence of an estoppel against the city in the pending litigation, I think should be extended to a specific agreement on the part of the company that the passage of the ordinance shall not affect in any way the claim and contention of the city that none of the companies have any valid track rights in the union loop. It should also contain a recital that the grant should be without prejudice to any contention brought by the people in the suit now pending on relation of the State's Attorney in this county.

Section 14. I am inclined to think with reference to the bond provided for in this section that it would perhaps be better for each company to file its separate bond, and I may add that the penalty in the bond as stated in the ordinance is altogether too small. The term of the bond and the liability thereunder should not be limited as it is in this section to a period of five years, and then for an additional term of five years at the demand of the City Council, but on the contrary, the bond should be co-terminus with the original ordinance grants to these companies. There should also be a provision either in this section or elsewhere that nothing in the ordinance should be held to extend the privileges of the original ordinances to these companies beyond the terms therein named.

Section 15. The writer has been given to understand in conferences with the counsel for the elevated railroads in committee meetings that the Oak Park Company would shortly be out of the hands of a receiver. For many reasons it

would be much more satisfactory to have the grant run to a corporation not under the control of the court. The difficulties in enforcing ordinance provisions against a corporation which is under the protection of the court are manifold and serious, and it has been the experience of the city that suits of this character are rarely productive of any adequate or satisfactory results. The court's protection of the estate in the receiver's hands ordinarily connotes a refusal to allow it to be materially interfered with by any demands on the part of the city. While not an absolute prerequisite to a proper ordinance grant it would be more satisfactory could this ordinance run to a corporation and not a receiver.

Section 16. The right of transfer of the privileges to successors is one which is ordinarily granted in ordinances but is purely a question of policy for the City Council. It may be refused if deemed best.

Section 17. This is the ordinary provision for acceptance, and I make no comment thereon.

In conclusion, I wish to call your attention to the fact that innumerable differences in the past have arisen between the city and the elevated railroad companies by reason of the lack of sufficient precision and detail in regard to the structure of the elevated railroads, all of which should be avoided in the present ordinance. It ought to be possible for the companies to state in clear language the exact type of structure they desire, and to embody the plans of such structure in plats, etc., to be filed with the Commissioner of Public Works so that neither the city nor the companies may be in doubt at any time as to just what changes the ordinance authorizes. I have no doubt that with the proffered co-operation of the railroad counsel these matters can be satisfactorily arranged.

Yours respectfully,

JOHN W. BECKWITH,
Acting Corporation Counsel.

MAY 21, 1913.

HON. JOHN MCWEENY, General Superintendent of Police.

Dear Sir:

A communication from your office, signed by H. F. Scheuttler, Acting General Superintendent, dated April 30, 1913, has been assigned to me for reply. Said communication encloses communication from Captain Meagher relative to junk yard of William Ritter who desires to move his junk yard to 715-725 West Adams street directly opposite and within one hundred feet of St. Patrick's School and sister's convent.

Said Ritter contends that he does not require a license; but the matter of location of a junk yard within the prohibited distance of a school does not exempt him from the provision of said Section 2267. It applies to junk shops and junk yards whether wholesale or retail, and is as follows:

"2267. Junk shops and junk yards prohibited—where.) No person, firm or corporation shall locate, establish, conduct or maintain any junk shop or junk yard within four hundred feet of any church, hospital, public or parochial school, said distance to be measured by the shortest straight line between the junk shop or junk yard sought to be located, established, conducted or maintained and any such building used for the purpose of a church, hospital, public or parochial school."

The question of a license for a wholesale junk dealer should not be confused with the question of the location of a junk yard whether wholesale or retail. It is true that in the case of *City of Chicago v. Lowenthal*, 242 Ill. 404, the Supreme Court decided that wholesale junk dealers did not require licenses but its decision was based on the ground that a wholesale dealer ought not to be expected to retain purchases in his warehouse for ten days before offering them for sale, because it would make the business of a wholesale junk dealer so burdensome as to render the ordinance void as unreasonable, and for the further reason that the superintendent of police shall have power to inspect their places of business, and all articles or things kept therein. While the regulations provided in the sections hereinbefore referred to would be

entirely proper of a junk dealer in small quantities it would not be so as to wholesale dealers.

In that case it was adjudged that the defendant was a wholesaler because his purchases were ninety-eight per cent. in carload lots and not less than wagon load lots. We find no adjudicated case wherein it is held that a wholesale junk dealer does not come within the purview of said Section 2267 relative to complying with its requirements as to location.

From the fact that the Supreme Court has modified and distinguished certain other ordinances relative to retail and wholesale junk dealers does not exempt a wholesale junk dealer from complying with said Section 2267 and even as it is stated in the *City of Chicago v. Lowenthal* case, *supra*, on page 408:

“It is the duty of a court to so construe an ordinance when it is susceptible of two constructions, as to sustain the ordinance.”

To the same effect is *Berry v. City of Chicago*, 192 Ill. 154, and in the case of *Wilbur v. City of Springfield*, 123 Ill. p. 395, on p. 402 the court holds as follows:

“It is a well settled principle, applicable to by-laws and ordinances, that if the provision relating to one subject matter be void, and as to another it be valid, and the two are not necessarily or inseparably connected, it may be enforced as to the valid portion as if the void portion had been omitted.”

Therefore, we are of the opinion that the said William Ritter cannot locate a junk shop or junk yard within the prohibited distance as provided in said Section 2267 and it matters not whether he is a wholesale or a retail junk dealer.

We return herewith the communication of Captain Meagher, dated April 28, 1913.

Yours respectfully,

M. W. CAGNEY,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Corporation Counsel.

MAY 22, 1913.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

We are in receipt of your favor of the 13th inst., transmitting a letter dated May 8, 1913, from the Comptroller of the Rock Island Lines, relative to a bill of \$217.27, for expenses incurred on account of water main laid across the right of way of said company during the months of July and August, 1912, and asking an opinion of this department if said bill should be accepted as a proper charge against the City of Chicago.

In reply thereto, we have to say the following: the City of Chicago in making needful improvements is acting by virtue of powers contained in Class 7, Section 1, Session Laws of 1911, page 174, which reads as follows:

“To let out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same,”

and by Clause 29 of the same section the following provision appears:

“To construct and keep in repair culverts, drains, sewers and cesspools and to regulate the use thereof.”

This office has heretofore held, and now holds, that public service corporations occupy space in the streets subject to the right of the city to install needed public improvements and that any expense incurred in maintaining or supporting the tracks of the railroad company during the course of construction of said improvements shall be borne by the company alone. This holding is based upon, among other reasons, the doctrine that the public safety, health and convenience of the public is paramount to any private right. The law is well settled in this state that a city or a person acting for it may temporarily obstruct a public street so far as it may be necessary to enable the city or its agent to construct a public improvement such as a tunnel, a sewer, a water supply pipe, etc., without becoming liable for damages to an abutting owner upon the street. *Lefkovitz v. City of Chicago*, 238 Ill. 28, and numerous cases therein cited.

It will be observed that this decision relates to the suit of an abutting owner, and has no reference to the law as to a public service corporation, although by analogy the same rule of law is probably applicable. This rule is subject to the qualification, however, that if properly pleaded, and if the city has completed or abandoned the work or that the obstruction complained of had been maintained in the street an unreasonable length of time, it might legally have followed that a right of action is maintainable.

In *Roanoke Gas Co. v. Roanoke*, 88 Va. 810, 14 S. E. 665, it was held that the franchise of a gas company to lay its pipes in the streets of a municipality is subject to the city's right to change the grades of the streets, and that the municipality, in lowering the grade of its streets, may require the gas company to remove pipes which have thereby become exposed and obstruct the highway; and the court refused to restrain the municipality from moving the pipes, which the gas company had refused to move. In this case the court did not pass upon the question of compensation, as its decision was limited to a denial of relief by injunction; and one of the grounds on which it placed its decision was that it saw no reason why the alleged injuries could not be adequately compensated by law, to which it added, "if, indeed, the acts complained of be not *damnum absque injuria*, as would seem to be the case."

From the latter part of this decision it appears that the court intimated that the case was one in which there was a damage without a cause of action. We fail to find any Illinois Supreme or Appellate Court decision directly on the question involved herein, and in the absence of such authority we must be governed by our previous ruling and in view of the foregoing, we must arrive at the conclusion of advising against the allowance of this claim.

Very truly yours,
EDMOND J. QUEENY,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

P. S.—We herewith return letter of Comptroller and bills attached thereto.

MAY 22, 1913.

HON. ALBERT J. FISHER, Chairman, Committee on Local Industries.

Dear Sir:

In accordance with the request of your committee that I furnish to a sub-committee the details of the proposed plan of establishing a uniform inspection service of railroads within the city limits and reasonable charges therefor to be paid by railroads crossing streets and alleys, I would premise that as stated before your committee the jurisdiction of municipal authorities over railroads is rather limited under our state laws.

Nevertheless, the system can be made effective by subjecting any grants now being asked to its provisions.

That there is urgent need of appropriate legislation is admitted, but a proper basis upon which the system can rest, is not so easily found.

By the provisions of Chapter 114 of the Revised Statutes, entitled "Railroads and Warehouses," as amended in 1911, the Railroad and Warehouse Commissioners exercise jurisdiction over the railroads in Illinois. Local authorities, however, may regulate speed of trains, crossing of streets, flagmen, etc.

Paragraphs 25, 26 and 27 of Section 1, Article V of the Cities and Villages Act contain the provisions under which the local authorities may exercise the police power vested in them over railroads within cities.

Paragraph 89 of said act grants to cities the power to extend streets, etc., over or across, and to lay sewers under or through any railroad right of way.

Paragraph 90 of the act limits the jurisdiction of the City Council in conferring upon railroad companies rights in streets, by providing that such power may only be exercised upon the consent of the owners of the land representing more than one-half of the frontage of the street sought to be used for railroad purposes.

Pursuant to these powers the City Council has passed numerous ordinances regulating steam railways, which may

be found in Article IV of Chapter LIX of the Chicago Code of 1911.

Whatever system of inspection, then, that may be established for the better regulation of railroads, must necessarily be confined within the limits of the powers granted.

Assuming that the city possesses the power to regulate the speed, stoppage at crossings, obstructions of streets, lights at night, ringing of bells and blowing of whistles, warning signs, flagmen, fences, lights at crossings, etc., it follows quite naturally that there is cast upon all railroads operating in the city a corresponding duty to observe these regulations.

The right to penalize for failure to observe these regulations is a necessary attribute of the powers vested in the City Council.

However, the exercise of such right to penalize would seem to be very ineffective unless it is coupled with the power of periodic inspection by officers of the city designated to perform that duty.

It follows that such inspection may be continuous, monthly, bi-monthly, quarterly, half-yearly or once in every year.

It follows just as naturally that such inspection must be paid for by the railroad companies affected thereby.

The city today, has an extensive inspection service for which a fee is charged, and I am of the opinion that the same service may be introduced to bring about a better regulation of railroad operation in the city.

It may be observed in conclusion that where trains are operated on an elevated structure many of the city's powers of regulation have been waived, but the general police power is still extant and cannot be contracted away. In all such cases the railroads have duties with reference to subways, paving, and repairing of streets and sidewalks, lighting, etc., that can only be properly enforced by an inspection service such as is here proposed.

All further details can be worked out by your committee, and may be incorporated in any ordinance now before you.

Respectfully submitted,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

MAY 26, 1913.

TO THE HONORABLE, the City Council of the City of Chicago.
Gentlemen:

I beg to reply herewith to your direction contained in an order passed May 5, 1913, Council Proceedings, p. 293, which is as follows:

“WHEREAS, the City’s share of the receipts of the traction companies now on deposit in the various banks yields a revenue of only 2½% interest, and

WHEREAS, It is desirable that the largest revenue possible be derived therefrom consistent with safety, therefore be it

ORDERED, That the Corporation Counsel be and he is hereby directed to report to this Council whether or not the City now has the power to invest such funds in the bonds of the surface traction lines or other securities and further, that if this end can be accomplished by ordinance, that he draft the necessary ordinance and submit same to this Council.”

I shall herein divide your order into two parts, namely:

1st: Whether or not the city has the power to invest the traction funds in the bonds of the surface traction lines or other securities;
and if the city has such power,

2nd: That ordinances providing for such investment be prepared.

FIRST: The so-called traction fund is a sinking fund for certain specified purposes created and maintained under the provisions of the ordinances granted to the Chicago City Railway Company and Chicago Railways Company, adopted February 11, 1907.

Section 25 of an ordinance to the Chicago Railways Com-

pany in providing for the financial details of the ordinances specified that—

“It is further provided, that, subject to the action of the City Council of said city, the said city shall deposit the amount so paid to the said city to the credit of a separate fund to be kept and used for the purchase and construction of street railways by said city; but any failure to comply with this provision shall in no way effect the rights or obligations of the company under this ordinance.”

The so-called Mueller Law (Hurd's Revised Statutes, 1911, p. 442), while enabling the city to own, construct, acquire, purchase, maintain and operate street railways and to grant such rights to others, makes no provision whatever for any sinking fund of this character and as above stated such fund owes its existence to the ordinance provision hereinbefore cited. The fund in question amounts at the present to approximately \$11,000,000 and since 1907 has been increasing steadily. Its existence and functions are recognized and commented upon in the case of *Barsaloux v. City of Chicago*, 245 Ill. 598.

The question arising in that case was whether the traction fund created under the ordinances of 1907 could be used for the purpose of preliminary work in connection with the proposed construction of subways. The court says upon page 611:

“The only remaining question requiring consideration is whether the city may use the special traction fund for the purpose of acquiring or constructing subways. Section 24 of the traction ordinance provides that the city shall deposit fifty-five per cent. of the net earnings of the traction companies to the credit of a separate fund, to be kept and used for the purchase and construction of street railways by said city. Under this ordinance clearly the city would have no power to divert this fund to general corporate purposes, but using it to construct subways is not a diversion of such fund. The construction of subways is the construction of street railways, and is therefore the identical purpose for which such fund may be used.”

Your Honorable Body itself has taken cognizance of the existence of this fund and provided for its disposition,

and on January 22, 1912, passed an ordinance directing the Comptroller to invest the traction funds in the purchase of tax anticipation warrants. (S. P. p. 2548.)

“Section 1. That the City Comptroller and City Treasurer be and they are hereby authorized and directed to use during the current year such portions of the Water Fund, the General Sinking Fund, the River Improvement Fund, the Sewer Fund, the Sinking Fund, for deposit of Chicago City Railway Company (as per Section 24, ordinance of February 11th, 1907), the Sinking Fund for deposit of Chicago Railways Company (as per Section 25, ordinance of February 11th, 1907), the Water Loan Fund, the Special Assessment Funds, New Land and the Special Assessment Funds, Old Law, and the School Tax Building Fund, respectively, now held in the Treasury of the City of Chicago as are not immediately necessary for the purposes of such funds, respectively, in the purchase of tax anticipation warrants issued by the City of Chicago against taxes levied by said City for the years 1911 and 1912.

“Section 2. Any tax anticipation warrants so purchased under authority hereof shall bear interest at the rate of two and one-quarter ($2\frac{1}{4}$) per centum per annum, and shall be held in the custody of the City Treasurer until paid and cancelled.

“Section 3. Upon the receipt by the City of the taxes against which such tax anticipation warrants are issued, the money so received, together with the interest on such tax anticipation warrants shall at once be credited to and placed in the particular fund or funds which were so used in purchasing such tax anticipation warrants and thereupon such tax anticipation warrants shall be cancelled by the City Treasurer and delivered by him to the City Comptroller”

The fund has pursuant to this ordinance been used in the purchase of tax anticipation warrants and has been credited with payments of interest at the rate of $2\frac{1}{4}\%$ on the loan of such funds. This method, of course, results in a distinct gain to the fund through the accumulation of interest and is in no way prohibited either by statutes or ordinance and from personal consultation with the City Comptroller I ascertain that this method finds favor with the city's fiscal officers for the reason, in addition to the advantages above

stated, that the funds are absolutely under the control of the city's officers, which, of course, would not be the case in the event of investment in securities of any other corporation.

I think there can be no question that the traction fund can be placed out at interest or invested in such a manner as to draw interest, provided always that it may be available within a reasonable time upon demand for its primary use, namely, the purchase or construction of the street railways or purposes incidental or necessary to such purchase or construction. The question of investment in particular securities such as the bonds of the surface traction lines or other securities is a matter within the sound discretion of Council.

It is proper to call your attention to the fact that should the Council direct the fiscal officers of the city to invest the traction fund in certain specified securities they would thereby relieve such officials from any and all obligation as to the safe keeping or proper production of such funds, the trusteeship of the fund being changed from the executive to the legislative branch of the city's government.

As to the policy of discontinuing the present method of investment of the traction fund, namely, the purchase by such fund of tax anticipation warrants in favor of one involving the purchase by such fund of securities which must in their nature be subject to market fluctuations, I, of course, express no opinion, the responsibility being one of a business and financial character.

In what has been above said the writer assumes, of course, that "the bonds of the surface traction lines or other securities" mentioned in your order are such securities as have a comparatively uniform and stable market value, and nothing hereinabove said should be taken as ven intimating that any securities, of whatever nature, could be purchased with the traction fund by direction of the Council which were not of the highest and soundest standing and repute and such as would be readily convertible into cash assets when a demand and necessity might arise for the purchase and construction of the street railways by the city.

SECOND. The direction in your order to draft an ordinance providing for the investment of such funds in the

bonds of surface traction lines or other securities, I apprehend, cannot be properly carried into effect by this department until the specific securities in which the funds are to be invested are decided upon so that the particular securities in which the funds are to be invested can be mentioned in the ordinance. A general blanket authority to the Comptroller to purchase bonds of surface traction lines or other securities, leaving it in his discretion as to what securities to purchase without any specification as to the particular class of securities or interest which should be obtained by reason of the purchase, would in my opinion be too broad and impose upon the Comptroller too large a responsibility.

In addition, the present ordinance directing the use of the traction fund in the purchase of tax anticipation warrants must necessarily be repealed and there is no indication from the language in the order of your Honorable Body as to whether you desire the repeal of this ordinance or not.

Upon being informed by your Honorable Body with respect to the particular securities wherein you desire the investment of the traction fund to be made and upon specific direction as to repeat the ordinance of January 22, 1912, with respect to the present investment of traction funds, we will prepare and submit to your Honorable Body the ordinance requested.

Respectfully submitted,

JOHN W. BECKWITH,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 27, 1913.

HON. W. J. McCURT, Superintendent of Water.

Dear Sir:

We have your communication of the 22nd instant stating, in effect, that the Water Bureau has on hand about 10,000 unused postal cards "which have from time to time been discarded because of more efficient and economical handling of the matters contained therein;" and that you find by inquiry

of the postal authorities that an exchange of these cards can be made and postage stamps received therefor to a value of about 75 per cent. of the postals; that the City Comptroller's office has been advised of the proposition and considers it fair and equitable, and requesting the Corporation Counsel for "an opinion as to the legality of the exchange on the terms referred to above."

There is no law authorizing or empowering the City to barter or exchange personal property.

The cards, however, may be sold according to the provisions of An Act "To Authorize Cities and Villages to Convey Real or Personal Estate not Necessary, etc.," as follows:

* * * * *

Chapter 24, Cities, Villages and Towns, p. 365, Hurd's
Rev. Stat. 1912.

Yours very truly,

GEO. B. O'REILLY,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

JUNE 2, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

After conferring with Mr. Reynolds, of the Harbor and Subway Commission, we have deemed it advisable, in order that we may be assured that we are working along the lines desired by you, to submit in writing our understanding of the several plans in contemplation with some observations concerning them. The plans which have been discussed, as understood by us, are as follows:

DOWNTOWN SUBWAY.

1. An ordinance directing the Harbor and Subway Commission to advertise for bids for the construction of a downtown subway along specified routes to be built by the city, by contract, according to plans and specifications to be prepared by the Subway Commission and on file in the office of

the Subway Commission when the ordinance is passed. Said subway to be paid for out of the traction fund and (if additional funds are required) by the proceeds of a bond issue or issues. The question of the approval of said ordinance to be submitted to the voters of the city at the election to be held on the first Tuesday of April, 1914. At the same election an ordinance calling for bids for the construction and operation of an independent comprehensive subway to be submitted to the voters as an alternative proposition.

This plan would contemplate that if the voters should approve it, the bids for the subway would be received and a second ordinance then prepared embodying the contract with the successful bidder for the construction of the subway and also the leasing thereof when completed to the elevated railroads. This second ordinance would be accepted by the construction company and the elevated railroads but would not be in force and effect until submitted to and approved by the voters of the city at the first general or special election coming after the passage of the ordinance.

2. An ordinance directing the Harbor and Subway Commission to advertise for bids for the construction of a downtown subway along specified routes to be built by the city, by contract, according to plans and specifications to be prepared by the Subway Commission and on file in the office of said Commission when the ordinance is passed. Said subway to be paid for out of the traction fund (if additional funds are required) by the proceeds of a bond issue or issues. Bids to be received without submitting the question to the voters. As soon as a satisfactory bid is received, an ordinance to be drafted embodying the contract with the successful bidder for the construction of the subway and also the leasing thereof when completed to the elevated railroads. This second ordinance would be accepted by the construction company and the elevated railroads, but would not be in force and effect unless and until submitted to and approved by the voters of the city at the election to be held on the first Tuesday of April, 1914.

COMPREHENSIVE INDEPENDENT SUBWAY.

1. An ordinance directing the Harbor and Subway Commission to advertise for bids for the construction and operation of a comprehensive independent subway along specified routes to be constructed and operated by the successful bidder for a period of twenty (20) years from the time of the grant. The construction to be according to plans and specifications to be prepared by and on file in the office of the Subway Commission when the ordinance is passed. The bidding to be on the basis of—

(a) The percentage per annum upon the amount actually and necessarily expended by the bidder in the construction and equipment of the subway and railroad therein, to be retained by the bidder out of the gross receipts from the operation of the subway and railroad as and for interest upon the investment of the bidder in such construction and equipment.

(b) The percentage per annum upon the money actually and necessarily expended by the bidder in the construction and equipment of the subway and railroad therein, to be retained by the bidder out of the gross receipts from the operation thereof as and for a sinking fund to amortize within the terms of the grant the amount invested by the bidder in the construction of the subway and railroad, excepting the equipment.

(c) The proportions which shall go to the bidder and the city, respectively, of that portion of the gross receipts from the operation of the subway and railroad, which shall remain after deducting from such gross receipts: (1st) operating expenses including taxes and insurance, (2nd) interest on investment, and (3rd) sinking fund.

(d) At the expiration of the 20-year grant, the equipment, then used for the operation of the railroad and reasonably required for its continued operation, to be purchased and taken over by the city or its licensee at the then fair cash value of such equipment.

The ordinance will also contain provisions in respect to purchase by the city, or its licensee, at any time, city control

of service regulations, city supervision of construction, equipment and determination of what should be considered capital upon which interest return should be allowed, etc.

The question of the approval of said ordinance to be submitted to the voters of the city at the election to be held on the first Tuesday in April, 1914. At the same election an ordinance calling for bids for the construction of a downtown subway to be submitted as an alternative proposition.

This plan would contemplate that if the voters should approve it at the election in April, 1914, the bids will then be received and a second ordinance granting the successful bidder the right to construct and operate the subway and railroad would then be prepared. Said ordinance would then be accepted by the successful bidder, but would not be in force and effect until submitted to and approved by the voters of the city.

2. An ordinance directing the Harbor and Subway Commission to advertise for bids for the construction and operation of a comprehensive independent subway upon the terms set out in the last preceding subdivision, with the exception that the construction would be in accordance with general plans and specifications to be followed by detailed plans and specifications. Said bids to be received without the submission of any question in relation thereto to popular vote. If a satisfactory bid should be received, an ordinance to be prepared granting to the successful bidder the right to construct and operate the subway and railroad for twenty (20) years, which ordinance would be accepted by the successful bidder, but would not be in force unless and until it was submitted to and approved by the voters of the city at the election to be held on the first Tuesday of April, 1914, at which election another ordinance calling for bids for a downtown subway should also be submitted as an alternative proposition.

It will be observed that the main point of difference between the plans outlined in subdivisions 1 and 2, both in the case of the downtown subway and the comprehensive subway is that the plans mentioned in subdivisions 1 do not contemplate that bids will be made until after the submission of the proposition to the voters at the election in April, 1914,

and that thereafter bids shall be requested and a second ordinance, based on the bids accepted, shall be submitted to the voters at a subsequent election; whereas, the plans outlined in subdivisions 2 contemplate that the bids shall be received as soon as practicable before the submission of any question to the voters and that the alternative ordinances (downtown or comprehensive subway), based upon the best bids received therefor, shall be submitted at the election in April, 1914.

Under the latter plan if the people approve of either the downtown subway or the comprehensive subway at the election in April, 1914, the construction could be started immediately thereafter. Under the former plan construction could not be commenced in any event until after the approval of one of the plans at an election subsequent to the election of April, 1914.

We will be greatly obliged if you will indicate which, if any, of the above plans you desire us to endeavor to work out, or suggest such changes in the plans herein stated as you may deem advisable.

Respectfully yours,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

JUNE 2, 1913.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

I have before me the claim of Henry Wulf, an employee in the city's service, for \$443.84 back salary from August 3, to November 20, 1911. The facts in this case are recited at length in an opinion from this department dated May 13, 1912, and are briefly as follows:

On March 10, 1911, the Civil Service Commission refused to approve Mr. Wulf's salary, but stated that as he was on a promotional list, if requisition were made his name would be certified to position of clerk, class 2, grade B, salary \$1,500 per year. This was done and ratified by the Com-

mission. On August 4, 1911, Mr. Wulf was laid off on the ground that the position was unnecessary. He continued out of work until November 20, 1911, when he was reinstated to the same grade and salary in the City Collector's office, his previous position having been Assistant Cashier in the Water Department.

Mr. Wulf's contention, as presented to me today by him, is that immediately upon his lay-off on August 3, 1911, as Assistant Cashier in the Water Department, the Civil Service Commission should have found another position for him of the same grade and salary in some other department, and he contends it would have been possible to have thus provided for his immediate employment by giving him a position occupied by a sixty-day man or temporary employe. Whether or not this was practicable at the time when he was laid off the writer is in no position to judge, but assumes, as he must, that the Civil Service Commission did its duty in the premises and that its action was dictated by proper consideration for the maintenance of the public service. It may have been practicable to reinstate Mr. Wulf on November 20, 1911, when it would not have been so to have taken such action before.

Section 10 of the Civil Service Act provides that temporary appointments may be made as follows:

"To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the commission, make temporary appointment to remain in force not exceeding sixty days, and only until regular appointments under the provisions of this act can be made."

Mr. Wulf's claim that a temporary appointee under this section filling a position of the same grade as his former position should have been laid off to make room for him immediately, is one which I am of opinion cannot be sustained.

Sections 7 and 9 of Rule 8 provide as follows:

"Sec. 7. LAY-OFF. Whenever it becomes necessary in any bureau, through lack of work or funds, or for other cause, to reduce the force in any employment, the person working in such bureau who was last certified for such employment shall be the first laid off. Seniority of

certification shall control in lay-off in cases of employes transferred from one bureau to another, or reinstated in the service. This section shall not apply to positions in the common labor service (Class L), in which employes may be laid off without regard to seniority."

"Sec. 9. REINSTATEMENT. When any officer or employe has been given a leave of absence in accordance with the rules of the Civil Service Commission, or has been laid off in accordance with said rules, the person taking such leave or the person so laid off shall have precedence for reinstatement from the eligible register of positions of the same class, grade and salary and of the same character of work, according to seniority in his position. Any officer or employe who secures a leave of absence or a lay-off contrary to the provisions of the rules of the Commission shall forfeit his right for reinstatement in the service, and the vacancy shall be filled by certification of an eligible, in accordance with the provisions of Section 10 of the Civil Service Act."

There is nothing before me to show that Mr. Wulf was not given precedence for reinstatement from the eligible register of positions of the same class, grade and salary and of the same character of work according to seniority in his position as is required by the latter rule with the exception of his bare statement that—

"the position which he now fills was filled by temporary appointment, at the time of his 'lay-off' and previous thereto contrary to the statute,"

and against the presumption that the Civil Service Commission was doing its duty according to law, this mere statement of the petitioner can scarcely be taken as effective to overthrow such presumption.

If it be conceded, however, that the Civil Service Commission should have exercised greater expedition in reinstating Mr. Wulf and displacing for that purpose a temporary employe whom he claims was holding a position of his grade, rank and salary, this alone would not entitle the claimant to the back compensation. As stated in our former opinion:

"There is nothing in the attached communication to show that Mr. Wulf performed any services from August 4 to November 20, 1911."

"This department has uniformly held that employes

are not entitled to pay in the event of their having performed no services for the city. Mr. Wulf having been laid off for motives of economy and for the reason that the position was no longer necessary, and having during the period named done no work for the city, we are of the opinion that there is no legal liability for the payment by the city to him of the sum claimed."

In whichever aspect the matter is viewed, we can reach no conclusion but the one formerly expressed in our communication to your Committee.

Very respectfully yours,
JOHN W. BECKWITH,
Acting Corporation Counsel.

JUNE 2, 1913.

HON. CHARLES F. SEYFERLICH, Fire Marshal.

Dear Sir:

A communication from your department signed by J. C. McDonnell, Chief of the Bureau of Fire Prevention and Public Safety, dated April 7, 1913, has been assigned to me for reply.

The questions asked are as to the authority of your department under Section 7 of Fire Prevention and Public Safety ordinance to send a force of firemen to tear down unsafe and dilapidated buildings, etc., also as to what liability is attached to the official in charge or to the City of Chicago as to future litigation.

Said communication states that there are many buildings which are dangerous to life and limb and which should be removed. Section 7 only refers to calling upon the Police Department for assistance in enforcing the ordinances, but does not even mention tearing down a building. In matters of this kind there is no doubt that the city officials have authority to call upon any department to enforce the ordinance.

Section 4 of said ordinance prescribed the method as to giving notice which, I take it from your communication, has already been complied with.

Section 256 of the Fire Prevention Ordinance defines what a nuisance consists of in reference to buildings and which is in part as follows:

"Any building * * * perilous to life or property

by reason of the nature, condition or quantity of its contents or its use, * * * is hereby declared to be a nuisance and within the meaning of this chapter, and the Chief of Fire Prevention and Public Safety is empowered and directed to cause any such nuisance to be abated."

There is no doubt of your authority to abate a nuisance under this Chapter, but I would particularly call your attention to Section 6 of said ordinance:

"The Chief of Fire Prevention and Public Safety shall have the power and it shall be his duty to enforce the provisions of all ordinances of the City of Chicago, which may tend to prevent the starting or spreading of fires or disastrous results in case of fires.

Nothing in this section contained shall be considered as lessening in any way the duty of the heads of other bureaus or departments of the City Government, upon whom said ordinances of the City of Chicago may impose the duty of enforcing their respective provisions."

Under Chapter 38 of the Health Ordinance the following sections of The Chicago Code of 1911 apply to nuisance generally:

Sections 1408, 1409, 1410, 1424, 1427 and 1429. Section 1428 is as follows:

"SUMMARY DEPARTMENT.) Whenever any nuisance shall be found on any premises within the city the commissioner of health is hereby authorized in his discretion to cause the same to be summarily abated in such manner as he may direct."

The city is specifically granted authority to abate nuisances of this kind under clause 62 of Article V, Chapter 24, R. S. of Illinois, which is as follows:

"The City Council, and the president and trustees in villages, for the purpose of guarding against the calamities of fire, shall have power to prescribe the limits within which wooden buildings shall not be erected or placed, or repaired, without permission, and to direct that all and any buildings within the fire limits, when the same shall have been damaged by fire, decay or otherwise, to the extent of fifty per cent. of the value, shall be torn down or removed and to prescribe the manner of ascertaining such damage."

And in pursuance of the authority granted to the City of

Chicago the following ordinances relative to abating nuisances as to buildings have been enacted; Sections 202, 653 and 477½.

Section 719 of the Chicago Code of 1911 is in part as follows:

“NUISANCE.) (a) Every building or structure constructed or maintained in violation of this chapter, or which is in an unsanitary condition, or in an unsafe or dangerous condition, or which in any manner endangers the health or safety of any person or persons, is hereby declared to be a public nuisance.”

On the subject of abating frame buildings which constituted a nuisance, the matter was thoroughly considered in the leading case of *Patterson v. Johnson*, 214 Ill. 481. The court quoted from many authorities and decided therein that the city not only had authority to abate frame buildings as nuisances within the fire limits, but also had such authority, though not specifically granted under said clause 62, to abate said nuisances beyond the fire limits. This case was very favorably commented upon in another leading case, *People v. Busse*, 240 Ill. 338, 345 and 346.

In the well considered case of *Sings v. City of Joliet*, 237 Ill. 300, on destroying frame buildings constituting a nuisance on page 309, it was contended before destroying such buildings the owners were entitled to have a day in court and in that connection the court said on page 310:

“In the exercise of the police power the command ‘so use your own property as not to injure others,’ and the maxim ‘the safety of the people is the supreme law,’ are to be observed and given effect. (*City of Chicago v. Gunning System*, 214 Ill. 628.) If in every emergency the owner of the property the destruction of which is deemed necessary must be given a hearing, the exercise of the police power would in many instances be so delayed that serious injury to public health and other public interests would result. In *King v. Davenport*, 98 Ill. 305, in considering a like question, the following language was quoted with approval (p. 313): ‘In the exercise of this (police) power the legislature may not only provide that certain kinds of property (either absolutely or when held in such a manner or under such circumstances as to be injurious, dangerous or noxious), may be seized and confiscated upon legal process after notice and

hearing, but may also, when necessary to insure the public safety, authorize them to be summarily destroyed by the municipal authorities without previous notice to the owner, as in the familiar cases of pulling down buildings to prevent the spreading of a conflagration or the impending fall of the buildings themselves, throwing overboard decaying or infected food, or abating other nuisances dangerous to health."

It was also contended (see p. 308) that the property in question therein, could not be lawfully destroyed under the authority of a special ordinance; that the nuisance must be abated under a general ordinance, but the court overruled this contention.

But the court held in that case, as a matter of fact, that whether or not the property in question constituted a nuisance in fact was a matter for judicial inquiry in the following language:

"The city was not justified in destroying this property unless the statement of alleged facts contained in the ordinance was true, and then only if the property was so located and in such condition that the danger to public health therefrom could not be obviated by the use of some reasonable measures less drastic than the absolute destruction of the property."

Therefore, we are of the opinion that the city has full power and authority to abate anything that amounts to a nuisance and in cases of grave danger to health or life or limb to abate the same summarily.

If there is no doubt as to the proof as to anything being a nuisance, there is no doubt as to the authority of the city to abate it.

I would suggest that a good method to preserve the proof as to a nuisance would be, in addition to the reports and information which you may have on these cases in your office, when you call upon the police or fire department to abate the nuisance that you direct the firemen or police officials in charge to examine the nuisance before abatement and that he makes a written report to your office with the names and addresses of the men who helped in the abatement so that

in case of litigation you would have ready access to all the information upon the subject.

Respectfully submitted,

M. W. CAGNEY,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 2, 1913.

RAY PALMER, Esq., City Electrician.

Dear Sir:

We have your letter of the 10th inst., in regard to the above entitled matter.

As you say in said letter, the contract is to be found in Council Proceedings of date October 3rd, 1910, on page 1447 and the following pages. It provides for the doing by the District of certain work in making re-arrangement of cables, wires, electrical devices and equipment of the City for certain purposes specified; providing, however, that a complete plan of the proposed re-arrangement, including a total estimate of the cost thereof, shall be submitted to the city electrician of said City, and approved by him in writing, before any change in said equipment shall be made. The contract, then proceeds to provide (Section 3, page 1448):

“That the expense of any such re-arrangement which shall be made for municipal electrical purposes of said City shall be borne by said City, and that the expense of any re-arrangement that shall be made for the corporate purposes of said District shall be borne by said District.”

By Section 19, at foot of page 1453, it is further provided:

“That each of the respective parties hereto, shall be held liable for any claim for damages to persons or property growing out of the negligent conduct or operation by it of the portion of said electrical system, which it is provided for herein shall be under its supervision, management and control.”

Certain work has been done in pursuance of this contract. In the doing of this work, workmen have been injured by accidents. The District is working under the Employers Liabil-

ity Act of 1911, (Session Laws 1911, page 314). The District has settled the claims arising from these accidents in accordance with the schedule of rates prescribed by the statute. This settlement aggregates between \$6,000 and \$7,000. The District now puts in a claim against the City for the total of those payments. and claims that they form part of the expense of such re-arrangement, within the meaning of the provision of the contract above quoted.

A conversation had by the undersigned with you discloses the fact that this is the first time the District has made any such claim. The question is, therefore, a new one.

There is abundant authority for the proposition that the doctrine of independent contractor applies to municipal corporations as well as to individuals; and that, as a general principle, a municipal corporation is not liable for accidents occurring in the doing of work which has been entrusted to an independent contractor. But this principle is modified by the further doctrine that, if the contract requires the doing of work which is intrinsically dangerous, the owner making the contract is liable for the results of accidents caused by such dangerous character of the work; and further, that where the work is done, pursuant to the contract, under the supervision of the engineer or other officer of the municipal corporation, the corporation is liable for damages resulting from accidents.

City of Joliet v. Harwood, 86 Ill. 110.

Village of Jefferson v. Chapman, 127 Ill. 438.

City of Chicago v. Murdock, 212 Ill. 9.

Robbins v. Chicago, 4 Wall. (71 U. S.) 657.

Dillon on Municipal Corporations, 5 Ed., Sections 1721 and 1722, pages 3025 and 3026.

The present case, however, is hardly a case of independent contractor. There is no claim that the City is liable directly to the parties injured. It is admitted that the City is not so liable. The claim is, that, by the special terms of the contract the City is liable to the District, which was liable to and has settled with the workmen who were injured. The fact of the claim resting on the special terms of the contract, renders it difficult to find authority expressly bearing on the question.

On the part of the District it is urged that it could make

no money by its contract to do this work. It agreed to do the work strictly at cost. While theoretically there would be no liability for accidents, unless such accidents were due to the negligence of the District or its employes, practical experience has shown abundantly, that, in the doing of this kind of work, accidents are inevitable. The accidents in question occurred in spite of the taking of all reasonable precautions. They ought, therefore, to be regarded as part of the cost of the work.

On the other hand, and on behalf of the City, it may be urged that the District was not liable to pay any damages for injuries to its workmen unless such injuries were the result of its negligence. The city agreed to pay the necessary expenses of doing the work in a careful manner; it did not agree to pay expenses or damages occasioned by the negligent doing of the work. The provision that an estimate of the total cost of the work was to be submitted before the work should be done is inconsistent with the claim that the city should be held liable for such damages as these. Finally, the District itself seems to have taken this view of the matter until, for some reason, it conceived the idea of making the present claim.

Suppose the case which occurs every day, of the Commonwealth Edison Company agreeing to wire the house of a private owner for electric lights. The wiring is to be done by the company, which is to charge cost and no more than cost, according to an estimate to be previously submitted. Suppose that, while this work is being done, one of the employes is hurt under such circumstances as makes the company liable; and suppose that the company settles the claim for a certain amount. Could the company, under such circumstances, hold the house owner for the amount of damage so paid to its employe? Is there any argument that could be advanced in favor of the liability of the City in the present case that could not also be advanced in favor of the liability of the house owner in the case just supposed?

Upon the whole, we are of the opinion that the City is not liable for these claims. But, even if it should turn out that we are wrong in this opinion, the question is certainly such

a close one as to justify us in advising the City not to pay these claims until the matter has been passed upon by a Court. If the attorneys for the Sanitary District really believe that the City is liable for these claims, it will be easy for them to devise a way of having the matter tested in court.

You ask us also to advise you whether, in case the city is liable, the claims should be provided for by the issuance of a new cost order, to which all of these claims for damages could be charged, or by having them apportioned under the various cost orders already issued. This is hardly a lawyer's question, but rather a question of account keeping or book-keeping, as to which you are probably better able to judge than we are. In any case, in view of the answer we have above given to your first question, there is no need for us to answer this second question.

Yours respectfully,

WILLIAM DILLON,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Acting Corporation Counsel.

JUNE 3, 1913.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

I have your communication of June 2 requesting the opinion of this department as to whether the Chief Justice of the Municipal Court is at present entitled to payment at the rate of \$10,000.00 per annum.

Under the appropriation for the year 1913, caption "Municipal Court, Office of Chief Justice," item "31-A," there is a specific appropriation for Chief Justice of \$7,500; "Chief Justice, additional, contingent upon increased revenue during 1913 through state legislation. . . . \$2,500.00," (C. P. January 2, 1913, page 3070).

The budget for this year was passed, prefaced by the stipulation and condition, as follows:

"That the amounts hereinafter set forth as appropriated for the corporate purposes of the City of Chicago,

or so much thereof as may be authorized by law and as may be needed, be and the same are hereby appropriated for such corporate purposes of the City of Chicago for the fiscal year beginning January 1st, 1913, and ending December 31st, 1913, provided, however, that not more than one-twelfth of eighty per cent. of the total amounts so appropriated and payable from the corporate purposes fund under the head of salaries and wages for each department, bureau, office, committee, commission, board, the Municipal Court of Chicago and the House of Correction respectively, exclusive of salaries of officers fixed by law and wages of laborers and mechanics, and not more than one-twelfth of seventy per cent. of the total amounts so appropriated for expenses for each department, bureau, office, committee, commission, board, the Municipal Court of Chicago and the House of Correction respectively payable from the corporate purposes fund other than salaries and wages and interest on corporate obligations, loss and cost in collection of taxes, taxes on corporate property, rentals of property used for corporate purposes, public benefits, judgments, court costs, maintenance of Juvenile Court and Houses of Shelter, and necessary election expenses shall be expended in any one month unless a statute is enacted and becomes a law in the year 1913 by virtue of which the revenues from taxation for corporate purposes of the City of Chicago for the year 1913 shall be increased beyond the amount now authorized by law, in which event, and contingent thereon, the expenditure of the additional twenty per cent. of said respective amounts so appropriated under the heads of salaries and wages and of the additional thirty per cent. of said respective amounts so appropriated for such other expenses or of such proportion of such additional twenty per cent and thirty per cent. respectively as the revenues of the City of Chicago may then permit shall be and the same is hereby authorized."

The salary heretofore appropriated during the year 1912 to the Chief Justice was \$7,500.00. The increase in salary could only be through an appropriation made during the year 1913 and would not be retrospective so as to include any part of the year 1912.

From the language employed in making the appropriation, there seems to have been no intention on the part of the City Council to appropriate for any services of the Chief Justice, except those running during the year 1913. The com-

pensation could be made contingent with respect to its payment on passage of legislation increasing the revenue of the city and such legislation having been passed and effectuated through the amendment of the Juul Law, which has been signed by the Governor, I am of the opinion that the Chief Justice is entitled to a salary at the rate of \$10,000.00 per annum, from January 1, 1913, to December 30, 1913, and you will be authorized to pay him at this rate.

Yours respectfully,

JOHN W. BECKWITH,
Acting Corporation Counsel.

JUNE 6, 1913.

HON. WILLIS O. NANCE, Chairman, Sub-committee of the Committee on Health.

Dear Sir:

I have your request for the opinion of this department as to whether a legal ordinance can be framed preventing the use of the so-called automobile "muffler cut out" directly from the driver's seat.

It is undoubtedly a fact of general knowledge of which courts will not assume to be more ignorant than the layman that the unnecessary use of muffler cut outs is productive of persistent and annoying noises in the city.

The automobile muffler "cut out" as a mechanical appurtenance has great advantages, although in regard to its *necessity* as a mechanical part of an internal combustion motor, there is great diversity of opinion. I think all internal combustion engineers will agree that its principal convenience, at least, is in enabling the driver of a car to test the motor to see if explosions are occurring with regularity in all cylinders.

The modern art of gasoline engine construction has advanced to such a stage that automobile motors are at present practically noiseless and the driver is enabled to determine whether his engine is "missing," that is, obtaining proper and regular explosions in the cylinders, by recourse to allowing the scavenger gas to escape directly through the exhaust pipe before entering the muffler. The muffler is a mechanical contrivance for expanding and attenuating the waste gases

from the motor cylinders and delaying their ultimate discharge to the outside atmosphere and in this way effectuating a silencing of noise which would otherwise result.

It was thought by engineers in the early day of the industry that some considerable excess of power could be obtained by running the waste gases directly to the outside atmosphere instead of conducting them through an intermediate muffler and this practice of doing away with the muffler generally obtains in racing machines.

I am inclined to think, however, that for city uses, so far as increasing the power of the motor is concerned, the muffler "cut out" is unnecessary as to its convenience in enabling the driver to detect "missing," I think the weight of opinion would be that it is of some importance. However, this fact would not prohibit the council from passing appropriate legislation with a view to decreasing what has been an almost intolerable nuisance.

By recent decision of our Supreme Court, (*Walden Shaw Livery Co. v. City of Chicago*), the law is stated to be that reasonable police regulations with respect to the use and management of automobiles may be passed by the municipality in the protection of the safety of the public. I think the general comfort and health of the public stand on no different grounds in regard to the ability of the city council to protect them by appropriate legislation, and I am therefore of the opinion that an ordinance, compelling automobiles to be so equipped as to render the muffler cut outs capable of operation by the driver only by getting out of his car, could be sustained in court.

Yours very truly,

JOHN W. BECKWITH,
Acting Corporation Counsel.

JUNE 7, 1913.

HON. JOHN MCWEENY, General Superintendent of Police.

Dear Sir:

In response to your communication of October 3, 1912, transmitting letter addressed to you of the Public Drug Company directing your attention to the ordinance forbidding the sale of certain drugs and stating that, "We will appreciate

the same if you will obtain for us a ruling from the Corporation Counsel as to what extent this ordinance is meant to control the sale of narcotics." we have to say:

First: The ordinance referred to, Section 808, Article IV, Chapter 22 of the Chicago Code of 1911 is as follows:

"808. SALE OF CERTAIN DRUGS FORBIDDEN EXCEPT ON WRITTEN PRESCRIPTION.) No druggist or other person shall sell or give away any morphine, cocaine, alpha or beta eucaine, chloral hydrate, or any salt or compound or derivative of any of the foregoing substances, or any substance, preparation or compound containing any of the foregoing substances, or any of their salts or compounds or derivatives, except upon the written prescription of a duly registered physician, which prescription shall contain the name and address of the person for whom prescribed, and the date the same shall have been filled, and shall be permanently retained on file by the person, firm or corporation where the same shall have been filled, and it shall be filled but once, and of it no copy shall be taken by any person, and the original shall at all times be open to the inspection of the prescriber, to the state board of pharmacy, and all officers of the law; except, however, that such morphine, cocaine, alpha or beta eucaine, chloral hydrate, or any salt or compound or derivative of the foregoing substances, or any substance, preparation or compound containing any of the foregoing substances, or any of their salts or compounds or derivatives, may lawfully be sold at wholesale upon the written order of a licensed pharmacist or licensed druggist, duly registered practicing physician, licensed veterinarian or licensed dentist; provided, that the wholesale dealer shall affix or cause to be affixed to the bottle, box, vessel or package containing the article sold, and upon the outside wrapper of the package as originally put up, a label distinctly displaying the name and quantity of morphine, cocaine, alpha or beta eucaine, chloral hydrate, or any salt or compound or derivative of any of the foregoing substances, or any substance, preparation or compound containing any of the foregoing substances, or any of their salts or compounds or derivatives sold, and the word 'poison' with the name and place of business of the seller, all printed in red ink; and provided, also, that the wholesale dealer shall, before delivering any of the articles, make or cause to be made in a book kept for the purpose an entry of

the sale thereof, stating the date of sale, the quantity, name and form in which sold, the name and address of the purchaser, and the name of the person by whom the entry is made; and the said book shall be always open for the inspection by the proper authorities of the law, and shall be preserved for at least five years after the date of the last entry made therein.

It shall be unlawful for any duly registered physician or other person to prescribe, sell or offer for sale, dispense or give away any morphine, cocaine, alpha or beta eucaine, chloral hydrate, or any salt or compound or derivative of any of the foregoing substances, or any substance, preparation or compound containing any of the foregoing substances, or any of their salts or compounds or derivatives, to any person addicted to the habitual use of morphine, cocaine, alpha or beta eucaine, chloral hydrate or any salt or compound or derivative of any of the foregoing substances, or any substance, preparation or compound containing any of the foregoing substances, or any of their salts or compounds or derivatives in any form.

Any person who shall violate any of the provisions of this section shall be fined not less than fifty dollars nor more than two hundred dollars for each offense."

Secondly: It is not the province of the Corporation Counsel nor the City Council, the Attorney General nor the Legislature to declare rulings defining the meaning of an ordinance or a statute. Even if a statute or ordinance contains a provision for liberal construction of the same such provision will not authorize construction beyond the general scope and purpose clearly expressed.

Elgin Hydraulic Company v. City of Elgin, 194 Ill. 476.

The construction of a statute or ordinance is a question for the courts, not for the legislature nor municipal councils.

People v. Kipley, 171 Ill. 44.

And the State Supreme Court possesses a paramount right to construe state statutes and municipal ordinances. In exercising this power the court can not by implication or inference add to or detract from, change or vary express provisions or read into the statute or ordinance limitations or

qualifications not expressed nor go beyond what is expressed in words or necessarily implied therefrom.

Tallon et al. v. Schempf et al., 67 Ill. 472.

Thompson v. Weller, 85 Ill. 197.

O'Donnell v. Colby, 153 Ill. 324, at page 328.

And in numerous cases our Supreme Court has held that where the language of a statute is unambiguous there is no necessity for construction.

Close scrutiny of Section 808, *supra*, shows that the same is free from ambiguity; that it means what it states and should be construed according to the natural import of its words, the words being given their accepted and ordinary meaning.

Way v. Way, 64 Ill. 406.

Culver v. Waters, 248 Ill. 163.

The technical words used therein, however, are to be construed in their technical sense.

Bedell v. Janney, 9 Ill. 193.

And the words, phrases and clauses are to be liberally construed to carry out the legislative intent of the Council.

Fisher et al. v. Spence et al., 150 Ill. 253.

The intention of the enacting legislative body prevails over the letter of the statute or ordinance and where the intent is clearly indicated, as it appears to us that it is in the section in question, it would prevail even though it had not been declared in such precise and explicit terms.

Wood v. Blanchard, 19 Ill. 38.

People ex rel. Keeney v. City of Chicago, 152 Ill. 546.

Apropos of intention, it should further be stated that the intention of a legislative body is always presumed to be in consonance with reason.

Harding v. The Rockford, Rock Island & St. Louis Railroad Company et al., 65 Ill. 90.

And a construction likely to endanger or sacrifice great public interest will not be presumed as intended by legislature or council.

People ex rel. Hamilton v. Canal Commissioners, 4 Ill. 153.

The section under consideration enumerates specifically morphine, cocaine, alpha or beta eucaine, chloral hydrate, or any salt or compound or derivative of any of the foregoing substances or any substance, preparation or compound containing any of the foregoing substances or any of their salt or compounds or derivatives. * * *

Expressio unius est exclusio alterius.

The enumeration of the foregoing substances specifically is an exclusion of cognate substances not mentioned in this section.

The above doctrine has been held by our Supreme Court to apply to municipal police powers.

City of Chicago v. M. & M. Hotel Company, 248 Ill. 264.

The meaning of the entire section is plain and in arriving at the meaning of a statute our Supreme Court has said in the Kipley case, *supra*, at page 77:

“In determining the meaning of a statute a court will have regard to existing circumstances or contemporaneous conditions and also to the objects sought to be obtained by the statute and the necessity or want of necessity for its adoption.”

Thirdly: It is obvious that Section 808, *supra*, a salutary, hygienic measure, broadly speaking, is intended to benefit society by the prevention of the sale of drugs therein classified by protecting its unfortunate members who have become addicted to the use thereof, from their own inclinations.

It is also to be noted in this behalf that while the ordinance under consideration is penal it is also remedial and the rule requiring strict construction of penal statutes will not be given such unreasonable application as to defeat the true intent and meaning of its enactment.

Zellers v. White, 208 Ill. 518.

The object of the ordinance is clearly not to hinder, hamper or harass reputable, honest retail dealers in conduct of their legitimate business and a fortiori, must it be said, it is patent that it was not intended for and could not be invoked as a measure to oppress such dealers, but to prevent the open

sale by any and the surreptitious dispensing of the poisonous substances classified, by unscrupulous dealers.

Yours very truly,

GEORGE B. O'REILLY,
Assistant Corporation Counsel.

Approved:

J. W. B.,

Acting Corporation Counsel.

JUNE 12, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have investigated the application of the Washingtonian Home through its attorney, for a remission of hospital license fees.

The ordinance provides (1216) :

"If an affidavit is made that the hospital during the previous calendar year has given to its patients not less than 10 per cent. of its general average capacity of bed days free of charge of any sort * * * the license fee may be remitted."

The statement accompanying the application recites that only 7 1/10 per cent. of the business done for the year 1911 was *absolutely free*. (The italicized words are in the statement.)

This does not bring the hospital within the terms of the ordinance, which require that the free service be 10 per cent.

It is further claimed that many patients pay only a portion of the charges and that after the unpaid balance the word "charity" is written, and that if such items are allowed, then the free service will be far in excess of 10 per cent. We have frequently advised the comptroller that the ordinance reading "free of any charge of any sort" denies such a claim.

Finally the claim is made that the Washingtonian Home is not incorporated for pecuniary profit; "that it is non-sectarian and that patients are admitted without discrimination as to race, religion, color, politics or condition." For this reason, the attorney claims that its entire work and investment is devoted to relieving the public burden and that

since the more help it receives, the more service it can give, it is therefore entirely charitable and should receive from the city the consideration of a free license.

The charter of the Washingtonian Home was considered by the Supreme Court in the case of *Washingtonian Home v. Chicago*, 157 Ill. 414. In this case a mandamus was prayed against the city to compel it to pay certain portions of its revenue for the benefit of the home. The Supreme Court denied the right of the city to give any portion of its revenues to this institution. The opinion considers the purposes and policy of the home at length.

The question turns on whether the home is a public or private corporation.

The court says:

"A hospital founded by a private benefactor is, in point of law, a private corporation though dedicated by its charter to general charity."

Speaking of the home, the court said:

"At all events no state control over the institution is provided for nor has Chicago or Cook County any voice in its control or management. * * * It is plain that the Washingtonian Home is nothing more than a private corporation."

The remitting of the hospital license is the same as donating \$100 per year to the Washingtonian Home.

If a donation should not be sustained because of the general policy of the home, then no remitting of the license can be sustained on the ground of the general policy of the home.

I am, therefore, of the opinion that this license can not be remitted on any of the three claims advanced by its attorney.

Very respectfully,

GEO. L. REKER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

JUNE 13, 1913.

JOHN D. RILEY, Esq., Superintendent of Maps.

Dear Sir:

In answer to your communication of the 10th inst. with reference to the city's rights in an alley shown in County Clerk's Division of Block 52, Original Town of Chicago, I am of the opinion:

1. That the city appears to have certain rights in that part of the alley in question which lies west of the present west line of north Market street and east of the east line of east Water street, vacated;

2. That all that part of the original alley lying within east Water street must be held to have been vacated when said street was vacated;

3. That the strip marked on plat "5 feet for foot passengers" which lies immediately east of the east line of the river, still remains intact and must be excluded from any act of vacation;

4. That while the building permits issued by the city, under which structures have been erected and are now resting upon all of said alley not vacated cannot be held to amount to a formal act of vacation under the statute, they nevertheless constitute an estoppel against the present assertion of any rights which the city may claim to have in the premises;

5. That whenever the owner of the property occupying any part of said alley desires to erect a new building covering the same, the city may assert its rights to said alley by refusing to grant any permit authorizing the owner to build upon it.

From the foregoing I conclude that in view of all the circumstances an ordinance exacting a reasonable compensation would be appropriated and dispose of the city's interest, which at best is of very small concern to the public in its present condition.

Very truly yours,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.
(All enclosures returned.)

JUNE 13, 1913.

HON. EDWARD COHEN, City Collector.

Dear Sir:

Your favor of the 11th inst., containing the following:

“Will you kindly render an opinion on the following proposition at your early convenience:

A party is the owner of one or more automobiles which he keeps in his own barn or private garage, and not in public stand, renting same out for hire. Should this party be compelled to take out a license for a garage as per section 2683 C. M. C., costing \$25.00, or can he take out a license as per Section 2663, covering a Public Passenger Automobile NOT on public stand, at \$5.00 per car.”

received. In reply thereto we have the following to say.

Section 2663 of the Chicago Code of 1911 is as follows:

“No person or corporation owning any hack, cab, omnibus, carriage or other vehicle of any description or name whatever, drawn by one or more horses, or any automobile, auto car or other similar self-propelled vehicle, which shall be used anywhere within the city for the carrying or conveying of persons for hire or reward, shall use or permit to be used any such vehicle anywhere within the city, without first obtaining a license so to do in the manner hereinafter set forth; provided, however, that nothing herein contained shall be construed as having any application to livery, boarding or sale stable keepers, or to garages, as hereinafter defined in this chapter, nor to the owners of vehicles which shall stand or be kept upon any public cab or hack stand upon any street or public way in the city for soliciting or securing employment; nor shall any license granted herein be authority for any license to conduct a livery, boarding or sale stable, or garage, or to stand any vehicle on any public cab or hack stand on the streets or public ways of the city for the purpose of securing or soliciting employment.”

Section 2664 of the Chicago Code of 1911 is as follows:

“Any person desiring to keep any public vehicle of the class defined in the foregoing section hereof shall make application for a license so to do to the mayor on a form to be provided by the city collector. Such application shall set forth the name of the applicant, and, if an individual or individuals, the place of his or their residence; if a corporation, the names of its officers and their places of residence. Such application shall also contain

a statement of the location of the place at which it is intended to keep such vehicle or vehicles and the number of vehicles so kept, together with a description of the style or type thereof. The mayor shall thereupon issue or cause to be issued a license upon the payment by such applicant to the city collector of a license fee of five dollars per annum, which said license shall expire on the thirty-first day of December following the date of issue."

Section 2686 of the Chicago Code contains the following provision:

"For all garages where vehicles are kept ready for use and where rent is paid to the keeper thereof for such keeping, or where vehicles are kept to be let out for hire or reward, or where vehicles are kept ready for use and where rent is paid to the keeper thereof and where vehicles are kept to be let out for hire or reward, the license fee shall be twenty-five dollars per annum."

It is obvious that Section 2663 is relative to the ownership of one automobile, for said section speaks of the singular number only, while Section 2686 is in the plural and speaks of "garages where vehicles are kept ready for use, etc."

It is my opinion therefore that if your party owns or controls more than one automobile for hire, that he should pay \$25.00 license fee, but if he controls but one automobile only then and in such event a fee of \$5.00 is a legal fee.

Yours truly,

EDWARD J. QUEENY,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

JUNE 16, 1913.

HON. GEORGE B. YOUNG, M. D., Commissioner of Health.

Dear Sir:

In the above entitled matter the application for an injunction to restrain the enforcement of the ordinance as against the Westerholm Company was argued about two months ago before Judge Honore. The judge refused to grant any injunction or restraining order.

It is now urged upon this office by Mr. Stafford, solicitor

for complainant in said suit, that whether his client be or be not entitled to an injunction, he has a grievance which has been caused by an opinion rendered by this department and which this department ought, therefore, to remedy so far as it may be able. He says that under the opinion as regards the proper interpretation of this ordinance, which was written by Mr. Boord and approved by the then Corporation Counsel on the 8th of November, 1909, the ordinance is being enforced, in such a way as to work an injustice to his client; and we are asked to remedy this, so far as may be, by modifying or withdrawing the opinion in question.

Mr. Boord, in his opinion, advises with considerable hesitation that persons who make and use the products named in the ordinance merely as an incident to their principal business, that is the business of carrying on a restaurant, a drug-store, a saloon, a fruit stand, etc., should not be considered as engaged "in the manufacturing or bottling" or as engaged "in the business of manufacturing or bottling" within the meaning of the ordinance. Such persons, he holds, are restaurateurs, druggists, saloon keepers and fruit and confectionery dealers respectively, and not manufacturers or bottlers of waters, etc., although they may incidentally make and bottle for their own use and trade.

It is impossible to say with confidence how the ordinance may be construed in this regard when the question comes to be passed upon by a court. We have not been able to find any authority bearing directly on the question; nor do we think it likely that any such authority will be found.

It is to be borne in mind that the main object of the ordinance is the protection of the public health, and so far as the protection of the public health is concerned, it is just as desirable that the ordinance should be enforced against those who make these waters and syrups for consumption in their own business, as that it should be enforced against those who make and bottle them for sale to retail dealers.

Upon the whole, and after giving this matter careful consideration, we have reached the conclusion that this office ought not any longer to assume the responsibility of exempting from the enforcement of the ordinance such large and im-

portant classes as saloon-keepers, druggists, restaurant-keepers, ice cream parlor keepers, etc., when it is clear that the protection of the public health calls for the enforcement of the ordinance as against these classes.

If such a construction as that suggested by Mr. Boord is to continue to regulate the enforcement of the ordinance, we would prefer that this construction should be put upon the ordinance by the court rather than this office.

In view of the policy heretofore pursued, we would suggest to you that it might be advisable to get up a short printed circular and mail same to the members of the classes above referred to as making these waters or syrups for use in their own trade. These classes will be found in the city directory. This circular should notify the parties to whom it is mailed that, owing to the modification of the ruling of the legal department in regard to the construction of the ordinance in question, said ordinance would in the future be enforced as against all persons who were as a matter of fact making the waters or syrups specified in the ordinance, whether for use in their own business or for sale to retail dealers. We presume that the cost of getting up and mailing such a circular would be comparatively trifling.

After this notice had been sent a few prosecutions might be started against saloon keepers, drug store keepers and ice cream parlors, etc. This would almost certainly lead to a bill for an injunction, the ground of equitable jurisdiction to be relied on being that of multiplicity of suits. (*City of Chicago v. Collins*, 175 Ill. 455.) But, whether the matter were decided in a court of equity in a bill for an injunction or by a judge of the Municipal Court on an attempt to enforce the ordinance by prosecution, the result would be the same so far as the responsibility of this office is concerned.

We would get a construction of the ordinance by the court, which would relieve this office from being responsible for the exempting of the classes above referred to, at grave danger to the public health.

You will, therefore, regard the former opinion of this office, upon which you have hitherto been acting, as withdrawn. We now advise you that the ordinance should be enforced as

against all persons who are, as a matter of fact, engaged in making the kinds of waters or syrups specified in the ordinance, whether such making be for consumption in their own business or for sale to retail dealers, until some court shall otherwise order.

Yours respectfully,
 WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:
 WM. H. SEXTON,
Corporation Counsel.

JUNE 20, 1913.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

In reply to your communication of the 5th inst., relative to the above subject matter, we have the honor to advise you that it appears from the civil service record submitted to us by the Secretary of the Civil Service Commission that Edward F. Kelling was ineligible to take the examination for Building Inspector in Charge because of the provision in the civil service act limiting a promotional examination to such members of the next lower rank as desire to submit themselves to such examinations.

The next lower rank, as used in this act, must be construed to mean those holding positions in the next lower rank by lawful authority, that is, under an appointment made pursuant to the civil service law.

The fact that Mr. Kelling, prior to the holding of the examination, actually performed the duties of Assistant Chief Inspector in the building department under temporary authority does not bring Mr. Kelling within that class of persons designated in the civil service act and the rules of the commission as holding a position in the grade next lower to that for which the examination was held.

Respectfully yours,
 JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:
 JOHN W. BECKWITH,
Acting Corporation Counsel.

JUNE 24, 1913.

MESSRS. COUGLE BROTHERS, 150-152 W. South Water St., Chicago.

Gentlemen:

Your letter asking by what authority of law the city takes and confiscates condemned food products that have been denaturized by health inspection so as to be unsalable as a food product but which may still be of some value to you for other purposes, has been handed to me for answer.

The city council has enacted an ordinance known as Section 1363 of the Chicago Code of 1911, which was amended November 25, 1912. (Council Proceedings, p. 2501.) Said ordinance, among others, contains the following clause:

“* * * And it shall be the duty of the Commissioner of Health or his duly authorized agent to enter any or all such premises above specified at any time of any day and to forthwith seize, condemn and destroy any such putrid, decayed, poisoned, infected or unsafe or unwholesome food which may be found in or upon such premises by the Commissioner of Health or his duly authorized agent; * * *.”

The material part of this clause was identical with the ordinance before amendment.

The validity and constitutionality of the original ordinance was sustained by the Supreme Court of the U. S. in the case of *North American Cold Storage Co. v. City of Chicago*, 211 U. S. Rep. page 306. That case was a bill to restrain the city officials from seizing and removing by virtue of said ordinance forty-seven barrels of poultry located in a cold storage warehouse. The opinion recites among other things the following: (page 315.)

“* * * The right to so seize is based upon the right and duty of the State to protect and guard, as far as possible, the lives and health of its inhabitants, and that it is proper to provide that food which is unfit for human consumption shall be summarily seized and destroyed to prevent the danger which would arise from eating it. The right to so seize and destroy is, of course, based upon the fact that the food is not fit to be eaten. Food that is in such a condition, if kept for sale or in danger of being sold, is in itself a nuisance, and a nuisance

of the most dangerous kind, involving, as it does, the health, if not the lives, of persons who may eat it. * * *."

Continuing on page 319 the court says:

"Complainant, however, contends that there was no emergency requiring speedy action for the destruction of the poultry in order to protect the public health from danger resulting from consumption of such poultry. It is said that the food was in cold storage, and that it would continue in the same condition it then was for three months, if properly stored, and that therefore the defendants had ample time in which to give notice to complainant or the owner and have a hearing of the question as to the condition of the poultry, and as the ordinance provided for no hearing, it was void. But we think this is not required. The power of the legislature to enact laws in relation to the public health being conceded, as it must be, it is to a great extent within legislative discretion as to whether any hearing need be given before the destruction of unwholesome food which is unfit for human consumption * * *."

On page 320 the court uses the following language:

"Even if it be a fact that some value may remain for certain purposes in food that is unfit for human consumption, the right to destroy it is not on that account taken away. The small value that might remain in said food is a mere incident, and furnishes no defense to its destruction when it is plainly kept to be sold at some time as food. *Reduction Company v. Sanitary Works*, 199 U. S. 306-322; *Gardner v. Michigan*, 199 U. S. 325, 331."

In the case of *Reduction Company v. Sanitary Works*, above cited, the court on page 323 says:

"* * * The cremation and destruction of garbage and house refuse, under the authority of the municipal authorities, preceding upon reasonable grounds, and at a place designated by law, as a means for the protection of the public health, cannot be properly regarded, within the meaning of the Constitution, as a taking of private property for public use, without compensation, simply because such garbage and house refuse may have had, at the time of its destruction, some element of value for certain purposes * * *."

In the other case above cited *Gardner v. Michigan*, the court on pages 332 and 333 says:

"Touching the suggestion that garbage and refuse

are valuable for the manufacture of merchantable grease and other products it is sufficient, in view of what we have said in the other case, to remark that it was a controlling obligation of the city, which it could not properly ignore, to protect the health of its people in all lawful ways having relation to that object; and if, in its judgment, fairly and reasonably exercised, the presence of garbage and refuse in the city, on the premises of householders and otherwise, would endanger the public health, by causing the spread of disease, then it could rightfully require such garbage and refuse to be removed and disposed of, even if it contained some elements of value. In such circumstances, the property rights of individuals in the noxious materials described in the ordinance must be subordinated to the general good. If it be said that the city might have adequately guarded the public health and at the same time saved the property rights of its owner on whose premises garbage and refuse were found, the answer is that the city evidently thought otherwise, and we cannot confidently say that its constituted authorities went beyond the necessities of the case and exceeded their proper functions when they passed the ordinance in question. Those ordinances cannot, therefore, according to well-settled principles, be held to be wanting in the due process of law required by the Constitution."

The doctrine in the case of *North American Cold Storage Co. v. City of Chicago*, has just recently been cited, followed and approved by the United States Supreme Court in the case of *Adams v. City of Milwaukee* (printed in advance sheets dated June 15, 1913) where a very drastic milk ordinance of the City of Milwaukee was sustained—the ordinance there directing that milk not conforming to certain requirements or not being kept in a certain way shall "upon the discovery thereof, be confiscated, forfeited and immediately destroyed by or under the direction of the Commissioner of Health."

As to the point that the health officials denaturize the condemned food products and that therefore they could not be sold for food, I desire to point out the law as shown in above cited cases, that it is largely within the discretion of the city council as to how and in what manner they will dispose of food not fit to be eaten; and our city council having directed that the health commissioners shall "*seize, condemn and destroy*" such food products, that method is the one to be fol-

lowed. There is no ordinance requiring or permitting merely the denaturizing of such products. Denaturizing is only a temporary precaution the health commissioners take to prevent the sale before the garbage collection wagon can be sent to take the products away to be "destroyed" as the ordinance directs.

The city council in passing this ordinance evidently decided that the complete destruction of unsalable food was the safest and surest way of guarding the health of the people from the dangers of such products. To leave such articles in the possession of a dealer and merely to direct him not to sell them for food, trusting to his honesty to comply with such direction, would be of little or no effect with unscrupulous persons.

The city council may also have had advice or experience about simply denaturizing unsafe food and concluded that kerosene oil and other denaturizing substances poured on the products, would not be sufficient to prevent it being used for food by some people, for it is known that some persons go through alleys and take and eat refuse from garbage cans, notwithstanding the stench and filth attending it.

Again, the council may have doubted whether the effects of the denaturizing substances could not be extracted from the food or lessened by time or otherwise. And still again, the presence of the denaturizing substances may possibly be concealed by the application of some drug.

The Supreme Court, as quoted above says: "Food that is in such condition" (as not fit to be eaten), if *kept for sale or in danger of being sold*, is, in itself, a nuisance, and a nuisance of the most dangerous kind, involving, as it does, the health, if not the lives, of persons who may eat it."

When a health officer enters a place of business and there finds decayed food he cannot read the mind of conscience of the person in possession. The mere presence of such food is evidence enough that it is "kept for sale or in danger of being sold" which the court declares is a nuisance.

I have not found any case raising the question of denaturizing unwholesome food as constituting a sufficient protection against the sale of such products for food. And, in

view of the language of the decisions above quoted, it may well be doubted whether the court on that point would reverse or modify its former rulings.

Yours very truly,

WILLIAM J. NAUGHTON,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 24, 1913.

HON. FRANCIS J. OWENS, Commissioner of Track Elevation.

Dear Sir:

We have your letter of the 11th inst. in regard to the above matter, which letter is herewith returned to you. In this letter you first state the past and present practice of the Council with regard to inserting in track elevation ordinances express provisions for the vacation of such parts of streets as are to be closed or obstructed by embankments. You then state that the ordinance at present in question "contains provisions for the vacation of two parts of streets required for use as a site for a station platform and building made necessary by the elevation of the tracks."

You then ask the following two questions:

1. Is this a proper and legal procedure? and,
2. Does the fact that the ordinance contains provisions for the vacation of parts of streets or alleys effect the validity of the ordinance?

A conversation had with you by the undersigned has disclosed the fact that you were in error in stating that the ordinance contained provisions for the vacation of the parts of streets required for the depot. It appears that this provision for vacation has been, on the suggestion of the attorneys for the railroad, changed so as not to expressly provide for vacation, but to provide in substance that the company shall be permitted to occupy these specific parts of streets with the embankment necessary for its depot.

As a further result of the conversation above referred to, we believe that we can best satisfy you upon the points

upon which you desire to be satisfied, by answering the following three questions:

1. Is it proper practice to insert in a track elevation ordinance a provision expressly providing for the vacation of all such parts of streets as are to be occupied by the structure?

2. If this be not a proper practice, is it still necessary or advisable that such an ordinance should be passed by a three-fourth majority of the Council?

3. Is a track elevation ordinance which provides that the railroad company, required to elevate its tracks, shall be allowed to occupy with its structure such specified parts of streets as are necessarily occupied thereby, a proper and valid ordinance if duly passed by the City Council on the recommendation of the track elevation committee?

We shall assume for the purposes of this opinion that the ordinance in the present case does not authorize the railroad company to occupy any greater portions of the streets than are absolutely needed for the purposes of the depot.

1. As regards the first question:

We understand that the general practice heretofore has been for track elevation ordinances to provide specifically for the vacation of such parts of streets as will be occupied by the embankments. You tell us that the former practice was to provide vaguely and indefinitely for such vacation without specifying the precise boundaries of the portions to be vacated; that abuses of this practice developed; and that the more recent practice has been to define specifically the precise limits of the parts vacated. You further tell us that the representatives of the railroads have in one or two recent cases asked to have this provision for vacation omitted, and to have inserted in place thereof a provision giving the railroad the right to occupy with their structures the specified parts of streets. We are not surprised to hear this in view of the recent decision of the Supreme Court in the case of *Sullivan v. A. T. & S. F. Ry. Co.* to be hereafter referred to.

The Supreme Court has in several cases decided that a city has the power to authorize a railway company, directed to elevate its tracks, to partially close or obstruct streets, or

to entirely close or obstruct them at the particular places where the embankment is placed upon the street, but that this power must be exercised within reasonable limits.

Summerfield v. Chicago, 197 Ill. 270 (2).

People v. A. T. & S. F. Ry. Co., 217 Ill. 594.

People v. Grand Trunk Ry. Co., 232 Ill. 292.

Just what would be a reasonable exercise of the power must of course depend upon the particular facts of each case. Without doubt, if a city were to authorize a railroad to completely obstruct every street it passed over, such an exercise of the power would be held unreasonable. But short of this, it is not possible to formulate a general rule which would enable us to draw a definite line. Upon the facts, however, of the present case, so far as you have given them to us, we do not believe that this question of reasonableness will arise.

In the cases cited it does not appear whether there were express provisions of the ordinances vacating the parts of the streets to be occupied by the structure. Nor is anything said in any of the cases above cited as to the question of the effect of the vacation or obstruction of parts of streets upon the title to the parts so vacated or obstructed. This question was specially called to the attention of the court in the case of *Weage v. C. & W. I. Rd. Co.*, 227 Ill. 421. There the railroad had been allowed by the elevation ordinance to occupy a portion of Wallace street for its entire width by the elevation embankment, thus entirely withdrawing that part of the street from public traffic other than traffic by way of the railroad. It was held that this did not work such a vacation of the portion of the street so occupied as to cause the fee to be in the abutting owners discharged of the easement.

This decision was followed, on a similar state of facts, in the case of *People v. Pittsburgh, etc. Ry. Co.*, 244 Ill. 166.

Next came the case of *Sullivan v. A. T. & S. F. Ry. Co.*, 251 Ill. 108 above referred to. In that case, by a track elevation ordinance of the City of Joliet, the railroad was allowed to cross Van Buren street without putting in a subway. This of course had the effect of entirely withdrawing the part of Van Buren street occupied by the embankment from public traffic, except by way of the railroad. On a bill by abutting

owners for an injunction to restrain the putting up or maintenance of the embankment, it was held that the vacation of that part of the street occupied by the embankment had the effect of vesting the fee in the abutting owners discharged of the easement; and that the railroad could not place its embankment upon such part of the street without first acquiring the right to do so by condemnation.

It does not clearly appear from the opinion in this case whether the ordinance contained a provision expressly vacating the part of the street to be occupied by the embankment. There are expressions in the opinion (pp. 112-113) which may seem to imply that the ordinance did contain such provision. But, on the other hand, what is said at the foot of page 113 seems to conclusively negative any such inference. Moreover, the decision is not put upon that ground. The case is attempted to be distinguished from the Weage case above cited, upon the ground that the trains upon the embankment, which closed up a part of the street in the Weage case, ran *along* the street, while the trains upon the embankment, which closed up a part of the street in the Sullivan case, ran *across* the street.

To the average mind the distinction may perhaps be difficult to understand, and may seem hardly sufficient to justify the different conclusions reached in the two cases.

Upon the whole, we would advise you that, in regard to this matter of adhering to the present or former practice of inserting in these ordinances a clause expressly vacating the parts of streets to be occupied by the structures, your committee may safely and properly be guided by the wishes of the lawyers for the railroad in each case. If abutting owners or original dedicators, as the case may be, should attempt to arrest the putting up of the structure by injunction, it will be for the railroad company, at its cost, to meet this attempt as it may be advised. At worst, it can institute condemnation proceedings, and go ahead with the work pending such proceedings, as was suggested by the form of the decree in the Sullivan case.

It is, therefore, only fair that the railroad company should be permitted to say what form it wants the ordinance to take as regards this matter.

2. As regards the second question above asked:

The statute provides that no street or part of a street shall be vacated or closed except by a three-quarters majority of the Council. The case of *People v. A. T. & S. F. Ry. Co.* cited above, decides that, whether there be an express vacation or only a practical vacation and closing by the permission to erect the structure in the street, the ordinance must be passed by a three-fourths majority in order to be valid. We, therefore, answer this second question in the affirmative.

3. For reasons which sufficiently appear from the foregoing discussion we answer the third question as follows:

A track elevation ordinance which provides that a railroad company, required to elevate its tracks, shall be allowed to occupy with its structure certain specified parts of streets so as to completely close up and obstruct the parts so occupied, is a proper and valid ordinance, if passed by a three-fourths majority of the City Council, on the recommendation of the Track Elevation Committee, providing that the permission to occupy and obstruct parts of streets be not carried to such an extent as to be unreasonable.

Respectfully submitted,

WILLIAM DILLON,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

JUNE 25, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In answer to your communication of the 16th inst., with reference to the strip along the east bank of the South Branch of the Chicago River, between Washington and Madison streets, which is claimed to be held by the City of Chicago in derogation of the riparian rights of William V. Kelley, who appears to be the owner of the south half of said block, we deem it necessary to call your Honor's attention to the following facts:

1. Under the provisions of the Act approved February 27, 1847, entitled "An Act to adjust and settle the title to the wharfing privileges in Chicago, and for other purposes," the common council of the City of Chicago was authorized not only to discontinue and vacate any part or portion of South Water, North Water, West Water and East Water streets, but also to adjust conflicting rights between the city and persons who claimed said streets or wharfing privileges.

The same act also vests in the common council the power of widening, contracting or straightening said streets or the river and its branches.

This act was amended in 1853 and made more specific in its terms, but all the features of the original act are preserved in the amended act.

Before the passage of the last mentioned act the common council in 1848, had passed two ordinances for the vacation of East Water street between Randolph and Madison streets, the latter of which ordinances provides that the vacation shall not be effective until the respective owners have agreed to the widening of Market street.

It appears from the abstract of title to the property here in question that the then owner of the property did comply with the Act of 1847 and the ordinances passed pursuant thereto, and did reserve a five foot strip next to and adjoining the river to remain forever open as a wharf or dock for the free passage of persons on foot, etc.

It is self-evident that this easement could not be lost through condemnation proceedings brought by the city, but must be held to be still existing along the east bank of the river.

It is true that there appears to be more land between the west line of the dock and the west face of the building than the five foot strip originally reserved. This excess, accurately determined, should be reconveyed to the owner by the city, and a proportionate amount of the compensation awarded in the condemnation proceedings should be paid the city by him.

The plat submitted with this opinion was prepared by the Map Department, but the amount of the excess land not taken for river widening appears to vary from the amount

shown on the map prepared by the Greeley-Howard Company which accompanied your communication.

Following our suggestion the agreement and ordinance submitted with your communication have likewise been amended and are herewith returned to you for submission to the City Council.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 30, 1913.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

At a meeting of your honorable body held on February 24, 1913, the following order was passed:

“Ordered, that the Corporation Counsel be and he is hereby directed to make an investigation and submit a report thereof, to this Council, at as early a date as possible, as to the rights of the city in that part of North Water street which lies between the West line of Franklin street and the West line of Wells street; and that part of Franklin street which lies between the South line of Kinzie street and the South line of North Water street heretofore vacated by ordinance of January 26, 1880, Council Proceedings, page 406.”

On June 2, 1913, C. P. p. 785, your honorable body again called upon this department to investigate the entire matter.

In compliance with these directions we wish to say: First: On January 26, 1880, the City Council passed the following ordinance, (C. P. p. 406):

“BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO:

Section 1. That so much of North Water street as lies between the West line of Franklin street, and the West line of Wells street, and so much of Franklin street as lies between the south line of Kinzie street and the South line of North Water street, be and the same are

hereby vacated and discontinued. PROVIDED, HOWEVER, that this ordinance shall not be operative until the Chicago and Northwestern Railway Company shall lay out and dedicate to the public use a new street running from Franklin street to Wells street parallel to North Water street, twenty-four feet in width, the North line of which shall be sixty-one feet South of the South line of North Water street, in such manner that the use of such proposed new street shall be absolutely vested in the public, and said railroad company shall construct thereon proper and convenient approaches to the viaduct on Wells street, and shall pave said proposed new street in such manner as the Commissioner of Public Works may direct, and build stone walls on each side thereof suitable for the protection and safe use of said street, and shall execute and deliver to the Comptroller its agreement perpetually to maintain said street, its approaches and protection walls aforesaid, and keep the same properly paved to the satisfaction of the Department of Public Works.

Section 2. This property is vacated on the express condition that it shall be used for the erection of a new depot building, and unless said structure shall be commenced within six months and completed within three years, this ordinance shall be null and void."

Second: On February 11, 1901 the City Council passed an ordinance, of which the following is a part; (C. P. p. 2122):

"Section 19. * * * And also, in consideration of the agreement by the Chicago and Northwestern Railway Company to accept this ordinance, and in consideration of the agreement by it to share the expense of the removal of any viaduct or the approaches thereto which may be removed in accordance with the provisions of paragraph 7 or Section 1 of this ordinance, it is ordained that that certain street extending from Wells street to Franklin street through Block 5 of the Original Town of Chicago, parallel to North Water street, twenty-four (24) feet in width, the North line of which said street is sixty-one (61) feet South of the South line of said North Water street, as said certain street is designated upon a map recorded in the office of the Recorder of Deeds in and for Cook County, Illinois, in Book 15 of Plats, on page 89, being designated upon said map "Proposed New Street," be and the same is hereby vacated."

Third: Following the passage of the ordinance of Janu-

ary 26, 1880, the Chicago & Northwestern Railway Company did erect a terminal station on part of the above named streets, which was used as such until recently when it was abandoned and is now being torn down.

Section 2 of the ordinance of January 26, 1880, states in plain terms that said streets are vacated on the express condition that the property shall be used for the erection of a new depot building, but without providing for the reversion of the streets in question to the city in case of abandonment, we believe that the rights of the city to recover the property vacated are somewhat doubtful.

However, our Supreme Court has held that the city holds its streets in trust for public uses and cannot grant any permanent easement therein for the benefit of private parties and to the exclusion of the public.

Snyder v. City of Mt. Pulaski, 176 Ill. 397.

Pennsylvania Co. v. City of Chicago, 181 Ill. 289.

Hibbard Co. v. City of Chicago, 173 Ill. 91.

It has also been held that a city has no power to grant to a railroad company the use of a street or any portion thereof for the purpose of railroad yards, switch tracks and depot grounds to the exclusion of the public and adjacent property owners, and an ordinance which purports to do this is void. (See *C. R. I. & P. Ry. Co. v. People*, 222 Ill. 427.)

It is proper to state that the long period which has elapsed between the first and second orders without report of any kind, is due entirely to the fact that the delicacy and seriousness of the subject matter seemed to warrant delay.

It may be added in conclusion that by the passage of another ordinance in 1901 that part of Franklin street which lies between the South line of North Water street vacated and the river was likewise vacated, but in this instance the company paid the city the sum of Twenty-five Thousand Dollars.

Following the principles laid down by the courts it is our opinion that the passage of the ordinance of January 26, 1880, conferred upon the railroad company no property rights that are beyond the power of the city to reclaim at the present time.

On the other hand your honorable body is the sole judge

of the question of what policy would best subserve the interests of the city in matters of this kind, which involve past actions of the City Council, through reliance upon which private rights may have accrued.

Respectfully submitted,
 NICHOLAS MICHELS,
 ALEXANDER E. ARKIN,
Assistants Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

JULY 1, 1913.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

You wrote to this department, under date of May 20, 1913, in reference to a judgment obtained against the City of Chicago by the Village of Oak Park, City of Berwyn and the Town of Cicero for the sum of \$172,784.43.

You state in your letter that this appears on your records as a single judgment, but that you are advised by the State Bank of Chicago that it holds assignments for that portion of the judgment in favor of the Town of Cicero amounting to \$49,886.32 and that portion in favor of the City of Berwyn amounting to \$14,553.64. You ask to be advised whether the judgment is divisible as indicated by your notice from the State Bank of Chicago, and you also make inquiry as to whether you would have a right to withhold payment of that portion of the judgment which is in favor of the Town of Cicero until settlement was made for unpaid warrants amounting to \$17,631.87 due from said town.

So far as the judgment appearing on your books as a single judgment is concerned, we are at a loss to understand why this should be so. The judgment was entered on July 22, 1910, *nunc pro tunc* as of June 30, 1910, and the sum decreed to be paid was divided among the various municipalities.

The Village of Oak Park obtained a decree for \$108,344.47, the City of Berwyn for \$14,553.64 and the Town of Cicero for \$49,886.32. These amounts were arrived at

by the court as settling and determining not only the amounts due from the city to the various municipalities involved but also included the adjustment of the amounts which these municipalities owed each other, all of which appears figured out in the decree.

On April 22, 1912, as you are no doubt aware, the City Council authorized and directed the Corporation Counsel to waive writ of error upon receipt of a policy guaranteeing the title of the property involved. On May 22, 1912, in pursuance of this order of the City Council, appeal and writ of error were waived and thereupon the decree and judgment in same became final.

Owing to the financial straits in which the city was placed last year, it was impossible to provide for the payment of same and the matter had to be deferred until the appropriation ordinance for 1913 was framed. You will find in that appropriation bill under Code designation 22-T there is an appropriation made for the payment of the judgment against the City of Chicago on behalf of the various municipalities and the amount due each is set forth in full.

The amounts so set forth for the City of Berwyn and the Town of Cicero tally with the assignments made to the State Bank of Chicago.

There is no reason why these municipalities can not assign their interest in such a judgment, if they see fit, and in case the State Bank of Chicago holds a valid assignment for these two parts of the total judgment there can be no objection to paying same, charging the amounts so paid against the appropriation made for that purpose.

With respect to the other question that you ask as to whether you have a right to set off the sum of \$17,631.87 due from the Town of Cicero to the City of Chicago for their portion of the election expenses from 1902 to May 1, 1913, this would depend on whether the amount so claimed is conceded by the Town of Cicero to be a liquidated claim against it. It would also depend on whether the rights of the third party, in this case the assignee, State Bank of Chicago, had attached without notice.

If the judgment had not been assigned, then the City of

Chicago would have the right to set off any judgment against the Town of Cicero and deduct it from the judgment in question. We might go farther and say that under such circumstances any liquidated claim might be so set off, because even if such set-off were not assented to by the authorities of the Town of Cicero it could be reduced to judgment quickly, if necessary. But this does not hold good as against the assignee of a judgment.

A third party to whom a judgment is assigned for value is not bound to take notice of counter claims against such final judgment or decree. When the assignment is placed on record in the court in which the judgment or decree was entered the assignee is substituted as the judgment creditor in place of the assignor.

Such being the case, we are of the opinion that the payments due to the City of Berwyn and the Town of Cicero should be made to the State Bank of Chicago if they hold valid assignments for same.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

JULY 2, 1913.

HON. EDWARD COHEN, City Collector.

Dear Sir:

Your communication of June 21, 1913, to this department, has been referred to me for reply. I gather from the communication and from a talk over the telephone with you, that the information you desire is, as to whether or not a person having applied for, and received, a license to operate a passenger automobile of less than 35 H. P. and paid \$10.00 for the same, can be credited with the amount of this fee upon a license to operate a passenger automobile of more than 35 H. P. This would be virtually refunding the prior license fee.

The decisions of our Supreme Court are against the refunding of any part of a license fee under the circumstances

as above stated, as will be seen from excerpts from decisions quoted below:

In *Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535, on page 543 the court said:

“* * * that a payment made with full knowledge of all the facts and circumstances, and in ignorance only of legal rights, cannot be recovered back. * * * Proof that one party is under no legal obligation to pay the money and that the other has no right to receive it is of no consequence unless the payment was compulsory, in the sense of depriving the one making the payment of the exercise of his free will.”

It is also said in *Walser v. Board of Education*, 160 Ill. 272 on page 276:

“Money paid voluntarily by one with knowledge or means of knowledge of all the facts cannot be recovered back.”

To the same effect:

Elston v. City of Chicago, 40 Ill. 514.

Town of Lyons v. Cook, 9 Ill. App. 543.

The only exceptions to the above rule of law are, first, when payments are made under duress, or, second, when said payments are made under protest. An action survives for recovery of payments made under such circumstances.

In addition to the above reasons for not refunding the money, I would respectfully call your attention to Section 1516 of the Chicago Code of 1911, which among other things contains the following:

“In no event shall any rebate or refund be made of any license fee or part thereof by reason of the death of the licensee, or by reason of non-user of such license, or by reason of a change of location or occupation of such licensee.”

I would call your attention to the fact that the vehicle tag would still be outstanding and the first automobile could be operated under that tag. And also, the automobile of more than 35 H. P. could be operated under the second vehicle tag; and as the police and other city officials would be satisfied, no doubt, upon seeing the last tag issued with the number of the

higher power machine. Hence two automobiles might be operated when only one license fee has been paid.

We are therefore of the opinion that you have not the power to issue a license to operate an automobile of more than 35 H. P. unless a fee of \$20.00 is paid therefor.

Respectfully,

M. W. CAGNEY,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

JULY 8, 1913.

JOSEPH F. PEACOCK, ESQ., City Real Estate Agent.

Dear Sir:

Your letter of June 23, 1913, addressed to the Corporation Counsel in the matter of the lease of the Hygenic Ice Company of an irregular strip of land situated between 47th and 51st streets and bounded on the West by the right of way of the Illinois Central Railroad Company and on the East by Lake Michigan, has been referred to me for reply.

Said lease was entered into between the City of Chicago and said Hygenic Ice Company demising to said lessee the said lands for the purposes of locating thereon a scale.

You desire to know what are the city's rights in the premises described and you state that a representative of the Illinois Central Railroad Company has protested to the Comptroller that part of the said tract of land is owned by the railroad company.

By decree entered by Judge Honore of the Circuit Court in July, 1912 and by supplemental decree entered June 25, 1913, the Easterly line of lands owned by the Illinois Central Railroad Company between the two points named, was located as follows:

"Beginning at a point on the center line of 41st street extended East, thence containing Southeasterly on a line parallel to and 300 feet East from the company's westerly waylands line as now established to intersect with the North line of 49th street extended East." From the center line of 49th street extended East I cannot

give the exact boundary line on the East side of the lands of the Illinois Central Railroad Company, but from a map in my possession I am led to believe it is approximately, as follows:

“Beginning at a point in the center line of 49th street extended East 300 feet East of the Westerly waylands line of said company; thence extending in a Southeasterly direction to a point about midway between 49th street extended East and 50th street extended East, at which point said Southeasterly line intersects the West line of the Northwest fractional quarter of Section 12, Township 38 North, Range 14, East of the 3rd P. M., thence South along the line of the said Northwest fractional quarter of said Section 12 to 51st street.”

The lands lying West of the above described line are owned or claimed by the Illinois Central Railroad Company and the City of Chicago so far as I know has no title to said lands. The lands lying East of the above described line and West of the waters of Lake Michigan and West of the West line of the Northwest fractional quarter of said Section 12, are owned and claimed by the South Park Commissioners, and the City of Chicago so far as I am informed has no title to said lands. The lands in the Southwesterly triangular portion of the said Northwest fractional quarter section are owned in fee by Clara M. Jones and under leasehold by the Beach Hotel Company, and the title to the lands in said Northwest fractional quarter section bordering on Lake Michigan and lying to the Northeast of the triangular portion mentioned is in dispute being claimed by the State of Illinois, Clara M. Jones and the Beach Hotel Company. The South Park Commissioners is also made a party defendant to the reclamation suit filed by the Attorney General. So far as I am informed the City of Chicago has no title to any of these lands.

I have thus gone into a detailed description of the above tracts of land for the reason that the exact location of the scale is not indicated either in said lease or in your communication. I have carefully read over the lease referred to, which is the original executed June 6, 1911. I find no conveyance or recital in the same whereby the City of Chicago covenants that it has title or agrees to maintain its title or the possession of

the said lessee, or whereby it assumes any obligations or liabilities whatever.

In regard to the Park Consolidation Bill referred to in your letter I may say has been vetoed by the Governor and the city will acquire no title or jurisdiction thereby.

I return herewith copy of council order, original lease bearing date June 6, 1911, bond of the Hygenic Ice Company of the same date and letter from the president of said company dated July 14, 1911.

Respectfully,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

JULY 9, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Complying with your verbal request for an opinion as to the number of saloon licenses that may be issued under the existing ordinances, we beg to say that in the case of *People ex rel. Fitzgerald v. Harrison, Mayor*, 256 Ill. 102, wherein the Supreme Court had under consideration the question of the validity of the Harkin ordinance, the court reached the conclusion that the ordinance was "valid in so far as it *limits the number of licenses* that may be issued, but invalid so far as it attempts to give a right of renewal to the licensee or his assignee."

It follows that so long as the Harkin ordinance remains unrepealed, the number of saloon licenses that may be issued is controlled thereby.

Section 2 of the Harkin ordinance (now Section 1528 of the Chicago Code of 1911) provides that all lawful saloon licenses in force on July 31, 1906, shall be renewed or reissued but no new licenses (other than a renewal or reissue) shall at any time thereafter be granted or issued until the number of licenses in force at the time shall be less than one for every five hundred of the population of the City of Chicago, where-

upon such new licenses may be issued from time to time to applicants according to priority of application until the total number of licenses in force shall equal one for every five hundred of the population of the City of Chicago.

Section 3 of the Harkin ordinance (Section 1529 of the Chicago Code of 1911, as amended July 17, 1911), gives to the owner of a license the right to a renewal or reissue of such license and the right to assign to another person such right to a renewal or a reissue of the license. Said Section 1529 also provides as follows:

“The privilege of renewal or reissue provided herein shall apply only so long as the license in each case shall have been kept in force continuously and uninterruptedly in the name of the licensee or his successor in interest.”

According to a report recently made to this department by the City Collector there were 7353 saloon licenses in force July 31, 1906 and the number of licenses now in force is 7152.

The 7152 saloon licenses now in force represent and are all of the licenses which were in force on July 31, 1906, which have been kept in force continuously and uninterruptedly since that date. The 201 licenses representing the difference between the number of licenses in force July 31, 1906 and the number of licenses now in force have not been kept in force continuously and uninterruptedly since July 31, 1906, and, inasmuch as the ordinance provides that licenses can be renewed and reissued only in cases where the licenses have been kept in force continuously and uninterruptedly since July 31, 1906, it follows that new licenses can not, under the existing ordinance, be issued in lieu of the 201 licenses which have been allowed to lapse since July 31, 1906.

We are, therefore, of the opinion that the total number of saloon licenses which may now be granted is the number now in force and issued, to wit: 7152.

Yours respectfully,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 9, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In reply to your inquiry concerning the amendment to the anti-noise ordinance, we beg to inform you that said amendment was passed on May 5, 1913, and appears on page 316 of the Council Proceedings of that date. The ordinance was published on May 14, 1913, and therefore became operative May 25, 1913. As amended, the said ordinance reads as follows:

“Section 2008. No person shall make or cause, permit or allow to be made *upon a public street or in such close proximity to a public street as to be distinctly and loudly audible upon such public street*, any noise of any kind by crying, calling or shouting or by means of any whistle, rattle, bell, gong, clapper, hammer, drum, horn, *hand-organ, mechanically operated piano, other musical instrument*, or similar mechanical device or *wind instrument* for the purpose of advertising any goods, wares or merchandise, or of attracting attention or inviting the patronage of any person to any business whatsoever.”

It will be observed from the above that the ordinance, insofar as it relates to musical instruments, is limited in its application to mechanically operated musical instruments, with the possible exception of drums and horns. Subject to that limitation, it prohibits all kinds of noises for the purpose of attracting attention or inviting patronage to any business, not only upon the public street, but when such noise is made in close proximity to the street so as to be distinctly and loudly audible thereon.

There is nothing in the ordinance which prohibits the playing of a piano or similar instrument, otherwise than mechanically, in a saloon or other place of business. It cannot be said, therefore, that this ordinance is violated where music is rendered otherwise than mechanically, even though it can be heard on the street.

In answer to your question as to whether the license of a place where music comes from and is distinctly heard on the street can be revoked, we are of the opinion that there are few, if any, instances where this can be done unless the noises

coming from the place are otherwise objectionable so that the place might be regarded as disorderly on that account. There are, of course, conditions under which the playing of music would constitute a nuisance, and if not abated the Mayor would have the right to act as in the case of all other nuisances, even to the extent of revoking the license if necessary.

The ordinances provide generally for the revocation of licenses in Section 1512, which authorizes the Mayor to revoke any license for cause. This general provision, however, under a familiar rule of construction, must be held to apply only to such licenses as have no conditions for revocation specifically provided for them. In many instances the ordinances clearly define what is sufficiently obnoxious to warrant a revocation. In all such cases these special provisions must be understood as limiting the general power to revoke licenses given in Section 1512.

Thus, in the case of dramshop licenses, under Section 1536, such licenses may be revoked when it shall appear to the satisfaction of the Mayor that the licensee has violated any ordinance relating to intoxicating liquors or any condition of the bond provided for in Section 1526. It does not appear from any of these conditions of the bond that such a place may be closed and the license revoked on account of music being played therein.

Again, in the case of second-hand dealers, the condition under which a license may be revoked is stated explicitly in Section 2269. In that section the violation of the two preceding sections or any other ordinance relating to the business of any second-hand dealer or keeper of a junk shop or yard is given as sufficient cause for revocation.

And in the cases of places of amusement, Section 116 provides specifically for the revocation of such licenses if the proviso that no gambling shall be permitted in the place has been violated.

In this way we might take up the different classes of business and point out in each instance what is necessary to constitute an offense sufficient to warrant the revocation of a license. Generally speaking, it may be said that the ordinances authorize such revocation whenever there has been a

violation of an ordinance relating to the regulation of the particular business.

We do not find anywhere authority for the revocation of a license merely because the licensee has violated an ordinance relating to some other subject matter, and such a provision would vest a greater degree of authority in the Mayor than seems to be contemplated by the ordinances taken as a whole.

We have on former occasions given opinions to the effect that it is not necessary that there should be an adjudication by a court before the Mayor has the right to revoke a license. He may act if he is satisfied that the party has rendered himself liable under the terms of the ordinances without first prosecuting him for the offense.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 10, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You have referred to this department two inquiries relating to the rights of the city in connection with the conditions that have arisen through the failure to secure the site for the proposed garbage reduction plant in time to construct same before the expiration of the present contract for garbage reduction .

Both of these questions involve the exercise of the right of eminent domain, and we therefore will speak generally of this power before taking up the questions separately.

The right to condemn property for public use in case of necessity is an inherent right of a sovereign state. It is limited only by the constitution and statutes, but when thus limited and defined, the right must be exercised in strict pursuance of the law as thus expressed.

The municipality, therefore, can exercise the power of eminent domain only as the same has been delegated to it by

the legislature. We find, in examining the statutes, that the legislature, in the Cities and Villages Act, has given the city power "to extend any street, alley or highway over or across, or to construct any sewer under or through any railroad track, right-of-way, or land of any railroad company;" also to "acquire lands by purchase or otherwise," for cemeteries. There is also authority given to condemn where property is needed for local improvements, to be paid for by special assessment.

To these powers was added the provision included in the Act of 1905, sometimes called the "Little Charter," under which broader power is conferred, the language of the statute being as follows:

"The City may exercise the right of eminent domain by condemnation proceedings in conformity with the provisions of the constitution and statutes of the State of Illinois for the acquirement of property useful, advantageous or desirable for municipal purposes, and the procedure in such cases shall be, as nearly as may be, like that provided for in an Act entitled 'An Act concerning local improvements,' approved June 14, 1897, in force July 1, 1897, as now or hereafter from time to time amended."

Under the broad powers conferred by the last mentioned act, the limitations which confined the rights of the city to real estate, easements and rights-of-way, under former acts as shown above, were entirely done away with, and it now has the right to condemn both real and personal property whenever the acquirement of such property is "useful, advantageous or desirable" for municipal purposes, subject, of course, to the general limitation that it can only be condemned for public use and for the benefit of the public.

In exercising this right the city is bound by the jurisdictional prerequisites found in the statutes. An appropriation must be made and authority must be given to acquire title by purchase or condemnation by means of an ordinance or order of the City Council, and then an effort must be made to secure the property by purchase. Upon the failure to agree with the owner, condemnation proceedings may be instituted.

These proceedings contemplate the filing of a petition and

the judgment of a court before the property can be seized or taken possession of. The legislature, if it saw fit, could grant the right to seize the property first, and afterwards pay compensation fixed by a competent tribunal. This was the method frequently authorized under special charters of corporations organized in the early history of the state (*Leshner v. Wabash Navigation Co.*, 14 Ill. 85), but is no longer in vogue.

With regard to the questions referred to above, you first ask whether it is within the power of the city to condemn the plant of the Chicago Reduction Company, which is now reducing the garbage under contract with the city.

In view of the powers granted under the Act of 1905, there is no doubt that the city has this right if it is unable to purchase the property at an agreed price. The contractual relations existing at the present time will not interfere with the institution of proceedings to condemn. Whatever property exists which public necessity demands may be appropriated to the public use.

Met. C. Ry. Co. v. C. W. D. Ry. Co., 87 Ill. 317;

Boston v. L. R. Corp., 2 Gray 1;

State v. Noyes, 47 Me. 189;

Eastern R. Co. v. B. & M. R. Co., 111 Mass. 125.

Consequently, if it is deemed advisable to do so, in case of a failure of negotiations with the Chicago Reduction Company for an extension of their present contract or for the purchase of their plant, condemnation proceedings may be instituted and carried to a successful conclusion.

The other question asked is whether the city would have the right to condemn the site which it seeks to obtain on the Drainage Canal, if the same is secured by the Manufacturers Junction Railway Company under proceedings now pending.

Property previously devoted to one public use may by the exercise of the power of eminent domain be taken for another public use, subject to the limitation that such property cannot be taken to be used for the same purpose in the same manner, as this would amount simply to the taking

of property from one and giving it to another without any benefit or advantage whatever to the public. (15 Cyc. 612.)

To warrant the taking of property of one party which is already devoted to a public use and placing it wholly or in part in the hands of another party for public use, it is essential that the new use be a different use, and also that the change from the present use shall be for the benefit of the public. (*L. S. R. R. Co. v. C. & W. I. R. R. Co.*, 97 Ill. 506.)

It is necessary, however, in order that such proceedings may be instituted, that the legislature should give authority to do so either in express terms or by necessary implication. A second condemnation is permitted under general powers granted by the legislature unless prohibited by statute where the second use does not impair the prior use. Thus, a boulevard can be extended across the tracks of a railroad company by condemnation under a statute which provides that commissioners may acquire by legal proceedings any land which may be found necessary for opening of any park or boulevard which may be hereafter located or established. (*Park Commissioners v. Mich. C. R. R. Co.*, 90 Mich. 385.) But where property has been legally condemned or acquired by purchase for a public use and has been or is about to be appropriated for such use, it cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication. (15 Cyc. 614.)

Smith v. C. & W. I. R. Co., 105 Ill. 511;

C. & A. R. R. Co. v. Pontiac, 169 Ill. 155;

P. F. W. & C. R. R. Co. v. Sanitary Dist., 218 Ill. 286.

If such express legislative authority has once been given, then the question of whether it was necessary is no longer one for judicial determination, the legislature being the sole judge as to the necessity for such use. To illustrate this point, we call attention to the case of *P. F. W. & C. R. Co. v. Sanitary District of Chicago*, 218 Ill. 286. The original act under which the Sanitary District operated gave it authority to acquire, by condemnation, "real and personal property,

right-of-way and privilege, either within or without its corporate limits, that may be required for its corporate purposes." When the Sanitary District undertook to condemn railroad property along side of the Chicago River, it became necessary to obtain an Act of Legislature giving express authority to do this. The enabling act was passed in 1901, and provided that any sanitary district organized as that was which uses any navigable stream or river for a portion of its channel, may for the purpose of widening, deepening or improving its main channel "acquire by purchase, or under and pursuant to the eminent domain laws of this state, or otherwise, sufficient land for the purpose of making such improvement by widening and deepening said stream."

The proceedings for condemnation in that case were contested on the ground that it was not necessary to condemn the property in question in order to accomplish the purpose. In that case, on this point, the court said:

"It is next contended the petition should have been dismissed because, as urged by the appellants, it was not necessary for the petitioner to take the land sought to be taken, as the object of its organization could be effected without the taking of said strip of land; and the appellants sought to show, upon a motion to dismiss, by affidavits which the court refused to consider but struck from the files, that the petitioner could obtain the flow of water required to effect the object of its organization by taking a strip of land from the river bank opposite the land of the appellants, or by deepening, instead of widening, the river at the point where appellants' land was situated, or by constructing by-passes beneath the surface of appellants' land sought to be taken, to accommodate the flow of water required by the petitioner to effect the object of its organization. The question of whether it was necessary that the petitioner acquire title to the strip of land sought to be taken in order that the object of its organization might be effected was a legislative, and not a judicial question, and was one to be determined by the trustees of the sanitary district, and not by the court in which the condemnation proceeding was pending. The court in which such a petition is pending may rightfully determine whether the petitioner has the power to exercise the right of eminent domain whether the property is subject to the right of eminent domain and is being taken

for a public use, whether the power is being abused by the taking of an excessive amount of property, and other kindred questions which do not involve a determination of the necessity or the expediency of the taking of the lands sought to be condemned; but where the right to condemn exists, and the property is subject to the exercise of the right of eminent domain, and is being condemned for a public use, and the right to condemn is not being abused, the court cannot deny the right to condemn on the ground that the exercise of the power is unnecessary or inexpedient, as the determination of that question devolves upon the legislative branch of the government, and is a question which the judicial branch of the government cannot determine. *Smith v. Chicago & W. I. R. Co.*, 105 Ill. 511; *Chicago & E. I. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Illinois C. R. Co. v. Chicago*, 141 Ill. 586, 17 L. R. A. 530, 30 N. E. 1044; *Chicago & A. R. Co. v. Pontiac*, 169 Ill. 155, 48 N. E. 485."

The above case and a large number of other cases cited in the note appearing in L. R. A. New Series, Vol. 2, page 227, clearly establish the rule that a second condemnation proceeding may be instituted for the purpose of subjecting the property in question to a more important or more beneficial use of the public, even where the property is already used for a public purpose and will be seriously impaired or entirely destroyed for that purpose, but that authority to condemn in such a case must come from the Legislature either by express provision or by necessary implication.

The only express authority which the city has in this respect is the power to condemn streets and sewers over rights of way and property of railroads. No other power to condemn property which is already devoted to a public use has been given to the city by the Legislature.

We are, therefore, brought to the conclusion that the city would have no power to take away the property on the drainage channel which it seeks to use as a site for a garbage reduction plant in case the same was acquired by the Manufacturers

Junction Railway Company as the result of a final judgment in the proceedings now pending.

Yours respectfully,

LEON HORNSTEIN,
EUGENE H. DUPEE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 10, 1913.

HON. CHAS. M. TWIGG, Chairman, Sub-Committee, Gas, Oil and Electric Light Committee.

Dear Sir:

On June 30, 1913, you informally asked this department for answers to the following queries:

1. Has any telegraph company in the City of Chicago any grant from the city for the maintenance and operation of its lines?

2. Is a grant from the city necessary to enable a telegraph company to maintain and operate its lines in the city?

3. Is an ordinance necessary to authorize the Stock Quotation Telegraph Company to maintain and operate lines of wires for the transmission and distribution of general financial news and market reports by ticker instruments?

A careful search of the ordinances of the City of Chicago now in force discloses the following in answer to your first query:

The Baltimore & Ohio Railroad Company has authority to construct and maintain lines of telegraph through certain streets of the City of Chicago, by an ordinance passed October 27, 1879.

The City Press Association of Chicago has authority to construct, maintain and operate telegraph lines through certain streets of the city by an ordinance passed April 10, 1893.

The Mutual Union Telegraph Company has authority to lay down, maintain wires in the City of Chicago by an ordinance passed October 10, 1881 and ordinance amendatory thereof.

The United States Telegraph Company has authority to construct and maintain lines of telegraph through the City of Chicago by an ordinance passed September 21, 1863.

The Cleveland Telegraph Company operates under an ordinance passed by the City Council on February 17, 1904.

The American District Telegraph Company operates under an ordinance passed by the City Council March 26, 1906.

The Chicago Electric Protective Company operates under an ordinance passed by the City Council on March 13, 1905.

The Illinois District Telegraph Company operates under an ordinance passed by the City Council March 26, 1906.

The Illinois Telephone & Telegraph Company operates under an ordinance passed by the City Council February 20, 1899.

The Peoples Mutual Telegraph Company operates under an ordinance passed by the City Council March 22, 1899.

Besides the foregoing there is a general ordinance authorizing all telegraph companies which have accepted the provisions, restrictions and obligations of the act of Congress approved July 4, 1866, to occupy streets and alleys, public grounds and places within the city with its poles, wires, etc. (See Chapter LXXVII, Chicago Code 1911.)

As to your second proposition, this department has on a number of occasions, rendered opinions relating to the subject matter thereof. The question involved has been elaborately discussed in these opinions, and numerous cases have been cited so that it will become necessary at this time only to make reference to these opinions and state the conclusions thereby reached.

Telegraph companies may be divided into two classes:

(a) Those which have accepted the benefits of the act of Congress of 1866 and acts amendatory thereof.

(b) Those which have not accepted the benefits of the act of Congress referred to.

As to the first class, under the provisions of the act of Congress, they are given the right to construct, maintain and operate lines of telegraph over and along all post roads of the United States, which includes streets and highways. (See printed opinions of the Corporation Counsel from April 5,

1897 to April 10, 1905, compiled and edited by Edgar B. Tolman, Corporation Counsel, pages 528 to 530 and 535 to 543.)

The grant of the foregoing power by act of Congress does not, however, preclude the City Council from requiring a permit from the city to erect poles and string wires along the streets of the city in such a manner or at such places as the proper officers of the City of Chicago may reasonably determine. Nor is the city prevented from requiring telegraph companies to pay compensation for the ground which it occupies by its poles, wires and apparatus.

(See printed opinions of Corporation Counsel referred to.)

Such provisions are made in Chapter LXXVI of the Chicago Code of 1911.

As to the second class, we held that a grant from the city is necessary to enable such a telegraph company to erect, maintain and operate its lines in the streets and public places of the city. (See Section 4, Chapter 134, H. R. S. 1911 page 2309.)

We are informed that the Stock Quotation Telegraph Company is a corporation organized under the laws of New York and has accepted the provisions of the act of Congress. It has been held, however, that the right to maintain and operate telegraph lines under the act of Congress is limited to devices known and in use when the act of 1866 was passed.

Richmond v. Southern Bell Telephone Co., 174 U. S. 761.

We are, therefore, of the opinion that the company would have no right to maintain and operate an automatic ticker service in the City of Chicago without authority from the city. (See printed opinions of the Corporation Counsel from April 5, 1897 to April 10, 1905, compiled and edited by Edgar B. Tolman, Corporation Counsel, page 528.)

There is, however, a general ordinance covering the subject matter of tickers which should be taken into consideration in passing any ordinance granting authority to any company to maintain and operate a ticker system. (See Chapter LXXVII, Chicago Code 1911.)

A draft of the ordinance submitted for your consideration contains the following provision:

“It is expressly understood and agreed that the rights and privileges granted hereunder are subject to all general ordinances of the City of Chicago now in force or which may hereafter become in force.”

We believe that under this provision the company will become amenable to all the provisions of Chapter LXXVII of the Code referred to and all ordinances amendatory thereof.

Very truly yours,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 10, 1913.

HON. H. H. EVANS, Secretary, Committee on Local Transportation.

Dear Sir:

In your letter of recent date you request this department to furnish the sub-committee of the Committee on Local Transportation with a complete statement 1st, of the rights of the city as they now stand with respect to the Hegewisch extension, also 2d, whether the attitude of the City of Chicago has been such as to release the Calumet and South Chicago Railway Company from the obligation to construct the Hegewisch extension.

The Hegewisch extension is provided for in an ordinance to the Calumet and South Chicago Railway Company, dated March 30, 1908. The route is specifically set out as follows:

“Extension from 106th street to Hegewisch on the east side of Calumet River on and along the following route: South on Green Bay avenue from 106th street to 118th street, thence west on 118th street to Superior avenue, thence south on Superior avenue to 122nd street, thence west on 122nd street to Carondelet avenue, thence south on Carondelet avenue to 130th street, thence east on 130th street to Erie avenue, thence south on Erie avenue to Howard avenue, with a ‘Y’ at the intersection of Erie and Howard avenues.”

Several alternate routes have been suggested by the people in the locality affected, as well as by the Calumet Company. This change in routes is sanctioned by the ordinance which provides;

“That in case a more direct route can be obtained before the construction of said extension is commenced under the provisions of this ordinance then, subject to the approval of the City Council said more direct route shall be substituted for the above described route.”

The change of routes has been the subject of discussion for several years before your committee and various sub-committees. There has been much talk about a so-called “Compromise Route.” The City Council, however, has at no time approved the substitution of the so-called “Compromise Route” in lieu of the route specifically set out in the ordinance of March 30, 1908. As a matter of fact the “Compromise Route” cannot be constructed for the reason that certain streets along the “Compromise Route” are not open.

The original route of the Hegewisch extension is more commonly known as the “Zigzag Route.” Frontage consents for this extension have been filed prior to July 6, 1909, and on this date an ordinance was granted to the Calumet Company which was,

“Subject to all the provisions, conditions, requirements and limitations of the ordinance passed by the City Council of the City of Chicago on March 30, 1908 * * * and of ‘exhibit b’ thereof.” (C. P. p. 1035.)

Since the passage of this last named ordinance it has developed that certain streets along the “Zigzag Route” are not open. It is exceedingly questionable whether the city can enforce the forfeiture provisions contained in the ordinance of March 30, 1908 by reason of the failure of the Calumet Company to build the “Zigzag Route” unless the city first furnishes a route of open streets upon which a street railway can be built. To build along the “Zigzag Route” would be a hazardous undertaking on the part of the company and might subject the company to considerable litigation. We do not believe that the company is obligated to expend any money for the purchase of a right of way for the Hegewich extension under the ordinance of March 30, 1908.

The Association of Commerce and other public spirited citizens have taken this matter up with the writer with a view of overcoming the obstacle of unopened streets. The writer has suggested that new frontage consents covering the "Zigzag Route" be secured and that dedications of all unopened streets be made by the abutting owners. This would save the necessity of long delayed condemnation proceedings.

As a result of considerable labor and effort new frontage consents covering the "Zigzag Route" have been secured and filed and on February 14, 1913 the Commissioner of Public Works reported a sufficiency thereof. The necessary dedicatory plats have also been prepared, but with one exception have not been recorded and remain in the possession of the writer.

The plat which has been recorded is signed by Wright Clark Bishop. The following described property is dedicated for use as a public street according to this plat of dedication, dated January 6, 1913:

"The West Sixty-six feet (66') of the East Three hundred sixty-three feet (363') of the South Four hundred sixty-two feet (462') and the South Thirty-three feet (33') of the West Five hundred sixteen and fifteen one-hundredths feet (516 15/100') of the East Eight hundred seventy-nine and fifteen one hundredths feet (879 15/100') all in the Southeast quarter (S. E. $\frac{1}{4}$) of the Northeast quarter (N. E. $\frac{1}{4}$) 19-37-15."

It seems that on January 6, 1913 (the date on which the plat was recorded) the title to the above property was held by one named Allison who secured this property from Bishop on March 18, 1912. Since Allison was the owner of the property on January 6, 1913 and not Bishop we are of the opinion that the dedication does not affect the aforesaid property in any manner whatever and that the dedication is invalid.

On January 13, 1913, the property was purchased by J. C. Morris at a foreclosure sale. It is our understanding that the present owner, J. C. Morris refuses to dedicate.

Under the circumstances we recommend that condemnation proceedings be instituted against the above mentioned property for the purpose of creating streets.

The remaining plats as heretofore stated are in the pos-

session of the writer and have never been recorded. The owners do not want to record the plats unless they are assured that the extension will be constructed. In case the present owners dispose of their property, complications may arise on account of the change of title. For this reason I believe it is advisable to condemn the property included in their plats. They are as follows:

1. The thirty-three feet (33') of the West ten hundred twenty-three feet (1023') (except the West thirty-three feet (33') thereof) of the East one thousand three hundred and twenty feet of the Southeast quarter (S. E. $\frac{1}{4}$) of section 19; 37; 15.

2. The South thirty-three feet (33') of the East six hundred sixty-six and one-half feet ($666\frac{1}{2}$ ') of the West six hundred ninety-nine and one-half feet ($699\frac{1}{2}$ ') of the Southwest quarter (S. W. $\frac{1}{4}$) of the Southeast quarter (S. E. $\frac{1}{4}$) of Section 30; 37; 15.

3. The West sixty-six feet (66') of the East two hundred forty-seven feet (247') of lots 1, 3, 4, 5, 6 and 7 of Division of the North one hundred and two acres (102) of the Northeast quarter (N. E. $\frac{1}{4}$) of Section 19; 37; 15. (The above lots 1 and 3 of Division of the North one hundred and two acres (102) are also known as lots 1 and 3 of the County Clerk's Division of lots 1, 2 and 3 of the Division of the North one hundred and two acres (102) of the Northeast quarter (N. E. $\frac{1}{4}$), Section 19; 37; 15.

4. The East thirty-three feet (33') except the North one hundred feet (100') of the East thirty-three feet (33') of Block eight (8) in the subdivision of the Northeast quarter (N. E. $\frac{1}{4}$) Southwest quarter (S. W. $\frac{1}{4}$), Section 30; 37; 15. (Acknowledged by Elan G. Clark and Charles C. Abell.)

On March 19, 1912, (C. P. p. 3209) an order was passed by the City Council to condemn certain streets along the so-called "Compromise Route." We recommend that this order of condemnation be rescinded for the reason that under the ordinance of March 30, 1908, the company cannot be compelled to construct the "Compromise Route." This is not so with the "Zigzag Route." The company as heretofore stated has contracted with the city in the ordinance of March 30, 1908, to construct the "Zigzag Route." If all the streets along this

route are open the company will have no legal excuse to refuse to construct this extension.

Answering the second part of your query we beg to advise you that the city has not prevented the company from constructing the extension along the "Compromise Route." The ordinance of March 30, 1908, provided that in case a more direct route can be obtained before the construction of the extension is commenced then subject to the approval of the City Council such more direct route could be substituted for the original route. The City Council at no time approved any route other than the original "Zigzag Route" specifically provided for in the ordinance of March 30, 1908.

We are of the opinion that the company by any action taken by the city has not been released from its obligation to construct the Hegewisch extension along the route specifically set out in the ordinance of March 30, 1908.

Should it meet with your approval we will prepare the necessary order to be passed by the City Council directing the condemnation of all unopened streets. If this is done and the streets are opened there will be no other obstacles in the way of the construction of the Hegewisch extension along the original "Zigzag Route."

Yours very truly,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JULY 11, 1913.

HON. F. W. SOLON, Superintendent of Streets.

Dear Sir:

Your communication dated July 7th, 1913, wherein you ask this department for an opinion as to the legal status of 43rd avenue between Ogden avenue and the Chicago, Burlington & Quincy Railroad, has been referred to the undersigned for reply. Complying therewith we have the following to say:

First: On May 1, 1890, a plat was recorded, known as "A. J. Weise's Subdivision," being a subdivision of Lot Four

(4) in County Clerk's division of that part of the northeast quarter (N. E. $\frac{1}{4}$) of section twenty-seven (27), township thirty-nine (39) north, range thirteen (13), lying north of the Chicago, Burlington & Quincy Railroad. In this plat 33 feet, being the east 33 feet of the said subdivision, were dedicated to the city as a street, and it is called 43rd avenue. This strip runs from the Chicago, Burlington & Quincy Railroad tracks to the north line of Ogden avenue. A careful investigation discloses that the 33 feet east of South 43rd avenue, as dedicated, have never been dedicated to the city.

Second: We also find that on May 11, 1908, the City Council passed an ordinance for the laying of a sewer in South 43rd avenue between Ogden avenue and the right of way of the Chicago, Burlington & Quincy Railroad. This sewer was laid 3 feet west of the east line of 43rd avenue as dedicated.

Third: We find that on September 26, 1878, the title in the 33 feet east of the east line of South 43rd avenue as dedicated was vested in the trustees of the Edward Mott Robinson estate, with the power to lease, sell and convey the same, but no power was given to the said trustees to dedicate any of the premises for street purposes. Our Supreme Court has repeatedly held that unless the trustees of an estate are given express power to dedicate they cannot make any dedication of any land which they hold in trust.

Palmer v. City of Chicago, 248 Ill., p. 203.

In view of the reasons assigned, we are of the opinion that 43rd avenue is 33 feet wide from Ogden avenue to the Chicago, Burlington & Quincy Railroad tracks.

We enclose a plat showing the street in question.

Respectfully submitted,

NICHOLAS MICHELS,
Assistant Corporation Counsel.
 ALEXANDER E. ARKIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 14, 1913.

HON. HUGO L. PITTE, Chairman, License Committee.

Dear Sir:

By a communication of June 6, from the City Clerk, we are asked to advise your Committee as to how far the City of Chicago can go in the matter of regulating the manufacture and sale at wholesale or retail of ice cream in the City of Chicago.

In discussing this question, it will be advisable to first enumerate the express powers given the city by the Legislature under which powers the right of regulation of the manufacture and sale of ice cream may be derived. (H. R. S. 1911, Chapter XXIV, Article 5.)

"The City Council in cities, and the President and Board of Trustees in villages, shall have the following powers":

"50. To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same."

"53. To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal and other provisions."

"66. To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

"78. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or suppression of disease."

In *Gundling v. Chicago*, 176 Ill. 340, the Supreme Court, while holding that paragraph fifty above gives no power to regulate the sale of cigarettes, yet, under paragraphs fifty-three, sixty-six and seventy-eight, such power is given, and the court says, pages 346 and 347:

"An ordinance may derive its validity from several different grants of power, and not depend solely upon any single section or clause of a statute. (*Kinsley v. City of Chicago*, 124 Ill. 359.) An implied power of a municipal corporation is a power necessarily incident to the exercise of those powers expressly granted and directly and immediately appropriate to their exercise. (*People ex rel. v. Chicago Gas Trust Co.*, 130 Ill. 268; *Chicago and Northwestern Railway Co. v. City of Chicago*, 148 *id.* 141; *Mathew v. City of Ottawa*, 114 *id.* 659.) The power to regulate the sale of an article includes the power to

require a license to authorize the sale thereof. (*Farwell v. City of Chicago*, 71 Ill. 269; *Chicago Packing Co. v. City of Chicago*, 88 *id.* 221; *Kinsley v. City of Chicago*, *supra.*) The licensing of a sale of an article is a legitimate means of regulating its sale. (*Chicago Packing Co. v. City of Chicago*, *supra.*)” See: x

Spiegler v. Chicago, 216 Ill. 214.

Chicago v. Gunning System, 214 Ill. 628.

In *City of Chicago v. Kluever*, 257 Ill. 317, in which the question of the power of a city to provide for the examination and licensing of drivers of automobiles for hire was recognized, the court says on page 322:

“The most important of the police powers is that of caring for the safety and health of the community. It was so held by this court in *Gundling v. City of Chicago*, 176 Ill. 340, where the court passed upon an ordinance providing for a license fee of \$100 per year for the sale of cigarettes and prohibiting any license to sell within two hundred feet of a school house. There was no express authority given in the charter for regulating or licensing the sale of cigarettes, and the claim of the appellant that no express power was given was sustained, but the court held that clause 66, authorizing the adoption of ordinances necessary to the exercise of the police power, and clause 78, authorizing regulations necessary or expedient for the promotion of health or the suppression of disease, authorized the city council to pass the ordinance. It was also held that municipalities are allowed a greater degree of liberty in legislating for the protection of the health of the community than on any other subject, and their powers in that respect are to be more liberally construed.”

In *City of Chicago v. Bowman Dairy Company*, 234 Ill. 294, the court sustained the validity of an ordinance regulating the use of milk bottles in the City of Chicago, although there is no express power given the city by the Legislature to regulate the use or sale of milk other than such power as is derived from the paragraphs above set out, and the United States Supreme Court, in *Adams v. City of Milwaukee*, 228 U. S. 572, sustained the validity of any ordinance regulating the sale of milk which provided for the inspection of cows by the city authorities, even without the territory of the city.

In the Gundling case, 176 Ill. 340, in construing the mean-

ing of the term "all other provisions," contained in paragraph fifty above quoted, the Supreme Court says that:

"The articles meats, poultry, fish, butter, cheese and lard which are expressly enumerated in the above paragraph and the power expressly given therein to regulate the sale thereof are articles of food for men and include, by the express enumeration, of articles only, provisions to be used for man. The term 'other provisions' by a familiar canon of construction can extend only to articles of the same character as those specifically enumerated. When general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated."

Bearing the above language of the Supreme Court in mind, and considering that ice cream is an article of food for man of daily consumption, I am of the opinion that express power is given the city to regulate the sale of ice cream, and where power is given the city to regulate the sale of an article, such power carries with it the power to license the sale of such article. However, even though it should be held that the city has no express power in this respect, yet in the light of recent decisions of the Supreme Court, I am of the opinion that the city may regulate the manufacture and sale of ice cream by inspection and licenses under its general police powers.

In *City of Chicago v. Ice Cream Company*, 252 Ill. 311, in passing upon the validity of Section 1160 of the Municipal Code of Chicago of 1905, which is in part as follows:

"Any person or corporation, or any agent or employee thereof, who shall keep for sale, offer for sale, or exchange, or shall sell or deliver or expose for sale, any * * * food which shall be impure, unwholesome, adulterated, or to which any harmful or injurious foreign substance has been added, shall be fined not less than Five (\$5.00) Dollars nor more than One Hundred (\$100.00) Dollars for each offense."

The Supreme Court says, pages 313, 314 and 315:

"Did the legislature intend by the passage of the Pure Food Act, in 1907, to deprive municipal authorities of all power to legislate on subjects touched upon or regulated by said act? Clearly not. Said act has certain

provisions with reference to milk and its measurement, but this court has held since its passage that a municipality could regulate by ordinance the size of the bottles or jars in which milk was sold. (*City of Chicago v. Bowman Dairy Co.*, 234 Ill. 294.) There are also many provisions in said Pure Food Act with reference to food. We recently held that a municipality could pass an ordinance regulating the sale and weight of bread. (*City of Chicago v. Schmidinger*, 243 Ill. 167.)

* * * * *

We think it is clear that the Pure Food Act was not intended to deprive cities and villages of the authority given by the provisions of article 5 of the City and Village Act to regulate and control, by ordinances not in conflict with said Pure Food law, the sale of foods, including such regulation as provided in said Section 1160 of the revised municipal code of Chicago. Municipal ordinances must be in harmony with the general laws of the State and with the municipal charter. In case of a conflict the ordinance must give way. The great weight of authority is to the effect that the legislature may confer police power upon a municipality over subjects within the provisions of existing State laws.

* * * * *

Municipal authorities cannot, under a general grant of power, such as article 5 of the City and Village Act, adopt ordinances which infringe the spirit of a State law or are repugnant to the policy of the State law as declared by general legislation, but the police regulations of a municipality may differ from those of the State upon the same subject, if they are not inconsistent therewith. (*McPherson v. Village of Chebanse*, 114 Ill. 46.) This ordinance does not prohibit what the statute permits."

What the Supreme Court says in the above case as to the conflict of that ordinance with the Pure Food Act of 1907 likewise will apply to conflict with an act relating to the manufacture of butterine and ice cream, approved June 3, 1907, enforced July 1, 1907, so that any regulation of the manufacture of ice cream must not infringe with this act nor prohibit anything which this act permits.

In conclusion, I beg to advise your committee, that the City of Chicago may make any reasonable regulation of the manufacture and sale at wholesale or retail of ice cream in the City of Chicago, provided that the same will not conflict with

the Ice Cream Act above referred to, and that the sale at retail may be licensed and the sale at wholesale may be also licensed, provided that such licensing does not interfere with interstate commerce. By the last qualification I mean that wholesale dealers who ship ice cream in quantities into this city from without the State cannot be licensed if the ice cream is to be reshipped in its original receptacles without the city.

Respectfully submitted,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 14, 1913.

HON. RAY PALMER, City Electrician.

Dear Sir:

We have your communication of the 27th ult. addressed to the Corporation Counsel, stating that in checking the statement of fees charged against the Western Union Telegraph Company and the Postal Telegraph Company you find that these Companies have wires on street railway trolley poles and propounding the following questions:

“Will you kindly advise whether these companies can be charged for these wires at the rate of 2½ cents per wire per street crossed, or at the rate of one dollar per trolley pole on which they make attachment, or whether no charge at all can be made?”

2. “Will you also kindly advise by what authority the street railway companies can allow these Companies to attach to the trolley poles?”

The ordinance imposing a license fee upon telegraph poles and wires in the City of Chicago is Article I, chapter 76, page 799 of the Chicago Code of 1911. We quote, *infra*, so much only of the ordinance as we deem to be directly applicable to the foregoing statement of facts in fixing liability for license fees upon the aforesaid telegraph companies, viz:

“* * * and in addition a fee of one dollar per annum for each and every telegraph pole used by it in the streets, alleys, public grounds or public places of the city.”

We have expressed this conclusion after much deliberation and consultation among the Corporation Counsel, First Assistant Corporation Counsel and the writer; and, while we regard the question as by no means free from doubt, in our view of the matter, the words, "telegraph pole" in the ordinance quoted, *supra*, includes trolley, power and any and every kind of pole to which telegraph wires are attached and maintained by the telegraph companies mentioned.

If your department desires to present claims against said Companies in conformity with the views herein expressed, this department will endeavor to collect the same.

Answering the other question, we beg leave to say that we know of no legal authority by which the street railway companies can allow telegraph companies to attach their wires to trolley poles.

Yours very truly,

GEO. B. O'REILLY,

Assistant Corporation Counsel.

JOHN W. BECKWITH,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JULY 14, 1913.

HON. RAY PALMER, City Electrician.

Dear Sir:

In your letter of July 1, 1913, you forwarded to this department a copy of the advertisement and specifications for bids on street signs, brackets and posts, and ask whether you can lawfully award a contract for about seventy-five per cent. *pro rata* of the number of each of same, for which bids were received, and you also ask whether you can designate the number of each item which the bidder will be required to furnish.

The specifications called for 8,000 (more or less) signs on brackets, 400 (more or less) signs on posts on concrete walk, and 3,600 (more or less) signs on posts with foundations. This was in conformity with the advertisement. The lowest bid calls for an expenditure of \$66,000 in case the full quantity was ordered, and the appropriation for this purpose is only

\$54,000. You suggest letting the contract for an amount which would not aggregate over \$50,000. The proposal, which formed a part of the specifications, and which was completely filled out both as to the full amount and as to each item specified, contained the following clause:

“In case of additions to or deductions from the quantities given in the specifications the following prices on each item are to be used as a basis for adjusting payments.”

This clause was followed by a list of the items and the prices of each. There was, therefore, ample provision made for some variation as to quantity, the only question now being how much the quantities may vary.

The words “more or less” as used in the specifications have been the subject of many judicial interpretations and their meaning is now fairly well defined. They are to be constructed as permitting only a narrow margin for variation, so that, while neither party to a contract can avoid it or set it aside by reason of any deficiency or surplus occasioned by no fraud or want of good faith if there is a reasonable approximation to the quantity specifically stipulated, yet they are to be held to apply only to “such accidental and immaterial variations in quantity as would naturally occur.”

Norrington v. Wright, 110 U. S. 189.

City of Chicago v. Galpin, 183 Ill. 399.

See also 5 Words & Phrases, 4583.

In case the contract had been let for the amount specified, therefore, it could not be claimed that the delivery and acceptance of about seventy-five per cent. of the quantity specified was a fulfillment of its terms. This is especially true of contracts entered into for a municipal corporation by the officers of same, who are bound to observe strictly the requirements of the legislative authority under which it is awarded.

“It is not only proper but necessary that bidders shall be duly informed by the officer soliciting bids as to the nature, quality, and quantity of the article to be purchased or the work to be done for the municipality to the end that they may bid intelligently and binding contracts may result therefrom.”

28 Cyc. 659.

Detroit v. Wayne Co., Cir. Judge, 79 Mich. 384.

Dillon on Mun. Corp. 5th Ed. Sec. 807.

There will be a material variation from the specifications if the contract is awarded for only about seventy-five per cent. of the quantity specified, and we would not regard it proper for you to award same, under the circumstances, without an order of the City Council authorizing you to do so. Such an order must receive an affirmative vote of two-thirds of all the aldermen elected. This order could no doubt be secured if it is your belief that it would be to the advantage of the city to make the contract with the lowest bidder under the specifications .

As to the other question that you ask in regard to the amounts of each item, the above will probably be sufficient to guide you. While not bound to the exact amounts originally specified, unless authority is obtained to vary same you would be compelled to adhere approximately to the quantity named.

We return herewith papers which you turned over to us as mentioned above.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JULY 14, 1913.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

You referred to this department an inquiry concerning a notice served by you on Mandel Brothers requiring them to remove their salesroom from the sub-basement of the recently constructed building at State and Madison streets, in accordance with the provisions of Section 480 of the Chicago Code of 1911.

Attached to your letter was a communication from the Mayor stating that he had been informed that the ordinance prohibiting such salesrooms in sub-basements was not passed until 1911, that the building was erected before it was in force,

and advising you to obtain an opinion from the law department as to whether the provisions of such were retroactive so as to apply to the building in question.

We are also in receipt of communications from counsel representing Mandel Brothers and copies of letters relating to the atmospheric conditions in this sub-basement saleroom, which were sent to this department with a view to demonstrating that the system of ventilation installed there was sufficient to keep down the percentage of carbon dioxide below the limit fixed by ordinance and to preserve a reasonable amount of purity in the air breathed therein.

These documents make it appear that the questions involved are whether the ordinance you are seeking to enforce is retroactive in its character and whether it can be enforced where sanitary conditions prevail.

If the determination of the matter depended on these two questions there would be considerable doubt as to your right to enforce this ordinance, but we do not understand that either of these are the real points at issue.

That part of Section 480 which relates to the subject-matter in hand reads as follows:

“(b) Not more than one floor of any basement or cellar shall be used for the retail sale of goods. Such floor shall be the floor nearest to the inside street grade. Such floor used for the retail sale of goods shall not be more than twenty feet below the inside street grade.

(c) No sub-basement, cellar or part of a basement below such floor shall be used for the sale of any goods in any manner, but locker and dressing rooms may be placed in the sub-basement, provided the space thus occupied be separated from the remainder of the basement by fireproof partitions, and that there be at least two flights of stairs placed as far apart as practicable leading therefrom to the first floor, inclosed in fireproof partitions. Such stairs from such locker or dressing rooms shall be in addition to other stairways required by this Chapter for such buildings, and at least one of such stairways shall open directly on a street, alley or court opening on a street or alley, or on a fireproof passage leading to the street, alley or such court. Where more than five lockers are in one room, such lockers shall be of incombustible material.”

The above is a re-enactment of similar provisions in Sec-

tion 451 of the Revised Municipal Code of 1905, where the identical language appears; so that the ordinance you are seeking to enforce was enacted long before the building was put up, and the question of retroactiveness does not enter into the matter at all.

Nor do we feel called upon to discuss or base our opinion on the sanitary conditions that are the subject of diverse views on the part of the Commissioner of Health, who says that such places are not capable of being made suitable for a salesroom, and the representatives of the owners, who insist that the expenditure of a large amount of money has resulted in perfect ventilation and satisfactory sanitary conditions. It goes without saying that if it could be shown that the sub-basement was unsanitary, and that the atmospheric conditions were below the standard set elsewhere in the Code, the use of same as a salesroom could be prohibited without having recourse to the ordinance invoked in the present instance. But while we do not decide this matter on the sanitary conditions existing there, it does not follow that every objection from the standpoint of health is removed when sufficient fresh air is forced into the place at stated intervals to overcome the excess of carbon dioxide that would otherwise accumulate.

The sole question presented is whether the ordinance is unreasonable as a building regulation designed to promote safety, health and comfort.

Ordinances which prescribe the manner in which buildings shall be erected, the extent to which they may be used with a given amount of equipment such as stairways, fire escapes, etc., the amount of floor space necessary for sanitary reasons or available for given purposes, the height of buildings, and other requirements relating to their construction, use and equipment, are recognized as within the police power of the municipality, subject to the test of reasonableness.

(Freund on Police Power, Section 118.)

In furtherance of these powers the same section of the Code (480—(a)—) limits the number of stories above the street grade which may be used as salesrooms in department stores to twelve. It cannot be assumed that there was any intention on the part of the City Council to make the pro-

visions relating to the portion of the building below the street level any more drastic than those relating to that part of it above the street level. Hence, the limitation represents the deliberate estimate which the City Council placed on the relative safety of a sub-basement as compared to the upper stories of a building.

This estimate cannot be said to be unreasonable in view of the fact that in case of a fire and stampede the people in the basement are shut off from the outer air, and subjected to the danger of darkness, water from above, smoke and falling debris. Their safety would have to be considered by those fighting the fire, and the firemen's work would be seriously hampered thereby. The mere contemplation of the possibilities is sufficient to convince one that the City Council has not erred by leaning too far on the side of safety.

Unless it clearly appears that the judgment and discretion of the City Council have been unreasonably exercised the courts will not hold an ordinance of this kind invalid.

Freund on Police Powers, Sections 143-4.

Chicago Dock & Canal Co. v. Fraley, U. S. Supreme Court, May 26, 1913.

State v. Redmon, 134 Wis. 89.

An examination of the authorities and recent decisions on similar laws inevitably lead to the conclusion that the City Council has not exceeded its powers in the present instance.

An ordinance prohibiting wooden stands on the roofs of buildings for spectatorial purposes was held reasonable in *Meltzer v. City of Chicago*, 152 Ill. App. 334, even though it was shown in that case that a stand built on a two story building strong enough for 300 persons was in fact used for only 100 persons. Its use for even such a limited number was prohibited.

In the case of *Benz v. Kremer*, 142 Wis. 1, an act providing that "no new bakery or confectionery establishment shall be established or operated in a room the floor of which is more than five feet below the level of the street, sidewalk or adjacent ground," was held to be in the interest of public health and a reasonable and valid exercise of the police power.

Benz v. Kremer, 142 Wis. 1.

An ordinance limiting the height of bill boards to six feet was held, in *City of Rochester v. West*, 164 N. Y. 510, to be a reasonable provision intended to provide for the safety of the community.

Other cases of similar import could be cited for the purpose of showing to what extent the courts will uphold as reasonable an ordinance which tends to promote public safety.

The recent case of *People v. Schenck*, 257 Ill. 384, does not in any way detract from the force of the authorities we cite. In that case the court held that an act prohibiting the use of emery wheels and belts in basements was invalid. The court's decision, however, was based on the fact that there was in that case a clear discrimination which is entirely absent in the present instance. Moreover, the safety of the public is here involved, an element which did not enter into the Schenck case at all, the health of the employes being the object in that case.

By preceding sections of the ordinance the prohibition as to retail salesrooms in sub-basements is limited to buildings of Class VII, otherwise known as department stores. The reason for this limitation is obvious. Places of this kind are patronized by large numbers of people, who throng the salesrooms until they tax their capacity.

Nor can it be said that these places are singled out for such a prohibitory enactment, since the ordinances absolutely prohibit the location of churches, class-rooms, halls or similar places below the street level so far as entrance and exits to same are concerned.

A full consideration of all the points involved and the authorities at hand brings us to the conclusion that there has been no abuse of discretion on the part of the City Council, and that the ordinance in question is a reasonable exercise of the police power of the municipality.

While this matter was under consideration in this office, the Department of Health brought suit against Mandel Brothers for a violation of the ordinance in question. This suit has just been decided by Judge Caverly of the Municipal Court in favor of the defendant, the court holding that the ordinance was unreasonable. The matter will be taken to the Supreme

Court by the city's law department for the purpose of obtaining a final decision on the points at issue, which we consider of great importance. Pending this appeal to the reviewing court, however, we recommend that no further prosecutions under this ordinance be started.

We return herewith the notice served on Mandel Brothers and the letter from the Mayor above referred to.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 16, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In reply to your letter of July 10, 1913, with reference to the installation of a water meter in the Presbyterian Nurses Home, at No. 1742-48 W. Congress street, we beg to say that we have taken this matter up with Mr. Burns, the Water Assessor, and report as follows:

This is an eight story building with a frontage of one hundred thirty (130) feet, with forty-six (46) water closets, fifty-four (54) baths and ninety-nine (99) wash basins and sinks; at the time this building was in the course of construction, the Water Department did not know what the character and nature of the building was to be.

This office understands from Mr. McCourt, Superintendent of Water, that it is the policy of the administration to install meters in all institutions where free water is now served in order to detect leakage, waste and unnecessary excessive use of water by these institutions, in order that they may not be allowed in any manner to abuse their privileges, and so that the city will be in a position to require of them to repair leaks, plumbing and do all other things that other persons are required to do who pay for water.

Recently a water meter was installed in a public hospital, the Chicago State Hospital, giving it free water up to the

point of 250,000 gallons per day in excess of which the regular rates are to be charged, so that the city might be able to detect leakage, waste, etc., and compel proper repairing of the plumbing to avoid said waste and leakage.

The nurses' home at Congress street and Ashland boulevard is on the so-called charitable and water exemption list, and has been so for years. In regard to the nurses' new home, now located at No. 1742 W. Congress street, we are of the opinion, and have so informed the Water Department, that under Section 2755 of the Chicago Code of 1911, this building is entitled to free water. The justification for installing the water meter at this new home is:

First. An absence of reliable information by the Water Department as to the real purpose for which it was to be used;

Second. The fact that there is a three inch service pipe leading into said premises;

Third. The fact that on account of the various reasons aforesaid, it is now the policy of the administration to keep a record of all free water used by institutions for the purposes mentioned in the previous paragraphs of this letter.

In addition to the above, there is no prohibition contained in Section 2755 preventing the city from installing meters in institutions entitled to free water, and Section 2785, among other things, says:

“That public hospitals and other public institutions and buildings shall have the water supply thereto controlled by water meters.”

Hoping this letter will satisfactorily explain the situation, we beg to remain

Very truly yours,

J. J. VITERNA,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JULY 16, 1913.

HON. HARRY E. LITTLER, Chairman, Committee on Harbors,
Wharves and Bridges.

Dear Sir:

Complying with the request made at the meeting of the Committee on Harbors, Wharves and Bridges, July 14, 1913, for a statement from this office setting forth the various methods by which title may be acquired by the City of Chicago in Harbor District No. 1 for harbor purposes, I submit the following:

Section 4 of the Harbor Act which went into force on July 1, 1913, provides in part as follows:

"Every such city and village for the purpose of carrying out the powers herein granted shall have the power to acquire, by purchase, unconditioned gift, or condemnation, any and all property necessary or appropriate for any of the purposes in this Act enumerated,".

Section 5 of said Act provides in part as follows:

"Every such city and village shall also have the right, power and authority, and such right, power and authority are hereby granted to use, occupy or reclaim all such submerged lands under the public waters of the State within the limits or jurisdiction of, or bordering on such city or village, as may be necessary or appropriate for any of the purposes in this Act enumerated,".

Section 6 provides as follows:

"Every such city and village shall also have the right, power and authority, and such right, power and authority are hereby granted, to take possession of, use and occupy any and all artificially made or reclaimed lands (which before the artificial making or reclamation thereof constituted a portion of the submerged lands under the public waters of the State of Illinois) within the limits or jurisdiction of, or bordering on such city or village, the title to which artificially made or reclaimed lands is in the State of Illinois, when and in so far as said lands shall be declared by ordinance of such city or village particularly describing said lands to be necessary or appropriate for any of the purposes in this Act enumerated; and every such city or village shall have the right, power and authority to bring and maintain all necessary suits, actions or proceedings, in its corporate name, against any person

or corporation, private, public or municipal, for the recovery of the possession of such artificially made or reclaimed lands, which lands, when so acquired, shall be held, used and occupied by such city or village subject to the conditions in this Act provided."

Section 7 is similar in its terms and provisions to Section 6, above quoted, and makes special express provision for the acquisition by city or village of artificially made or reclaimed lands "for approaches to or connections with any harbor or harbor utility or appurtenance.

Section 12 of said Act provides as follows:

"Every such city and village may also acquire the lands, whether of natural or artificial formation, property and property rights, including riparian rights, of any owner or claimant, whether a person or corporation, private, public or municipal (other than a city or village), on the shores of public waters in, upon or near which it is proposed to construct any harbor or utility authorized by this Act, and also the title of any such owner or claimant, to the lands lying beneath, adjacent to or adjoining such public waters, without other compensation, by agreeing with any such owner or claimant, upon a boundary line dividing the lands (whether of natural or artificial formation), to be acquired by such city or village and the adjacent, adjoining or submerged or other lands (whether of natural or artificial formation), to be taken and acquired by such owner or claimant. The rights and property to be taken and acquired, respectively, by any such city or village and by any such owner or claimant, shall be specifically described and set forth in the decree to be entered by the court is in this Act provided.";

and Section 13 defines the procedure by which such a boundary line may be established.

It will be seen from the foregoing quotations that title may be acquired by six different methods. Three of these methods are provided for in Section 4.

First: Title may be acquired by purchase. Where the parties can agree this is unquestionably the speediest method.

Second: Section 4 provides for acquisition of title by unconditioned gift. This method was also contained in the Harbor Act of June 10, 1911. Under this provision the City may accept title to a tract of ground bordering upon the lake

front suitable for harbor purposes which is donated outright without any condition whatever by the owner thereof to the City.

Third: Section 4 also provides for acquiring property for harbor purposes by condemnation. This is a well-known method, and is resorted to when the parties cannot agree upon terms of purchase. The filing of a petition in condemnation is held by our Supreme Court to be an admission of title in the parties who are made defendants to the petition. This method would consume considerable time, and in the end would mean the payment of whatever might be found to be the fair compensation for the land and rights taken.

Fourth: The method of acquisition provided for in Section 5 applies only to the use, occupation or reclamation of the submerged lands under the public waters of the State of Illinois and does not apply to lands above the surface of the water.

Fifth: By Sections 6 and 7 the State of Illinois gives to a city or village the right to take possession of, use and occupy any and all artificially made or reclaimed lands which before the artificial making or reclamation thereof constituted a portion of the submerged lands under the public waters of the State, the title to which is in the State of Illinois, when and in so far as said lands shall be declared by ordinance of such city or village, particularly describing said lands, to be necessary or appropriate for harbor purposes, and authorizes such city or village to bring and maintain all necessary suits, actions or proceedings in its corporate name, for the recovery of the possession of such lands. Assuming that the lands in Harbor District No. 1 sought to be acquired for harbor purposes were artificially made or reclaimed, and that the title is in the State of Illinois, the City of Chicago, after passing an ordinance describing just how much of said lands are necessary or appropriate for its harbor purposes, might then bring suit against the Chicago Dock & Canal Company or any other claimants who have made or reclaimed these lands for the recovery of the possession of the same. It would very likely take several years of hard-fought litigation to determine this question. A similar case, in which the Thirteenth street pier of the Illinois

Central Railroad Company was involved, went to the Supreme Court of the United States and consumed about nineteen years of litigation. The case was commenced, by information, in the Circuit Court of Cook County in the year 1883. It was removed by petition to the United States Circuit Court, which handed down a decision February 23, 1888. From there it went to the Supreme Court of the United States and was decided December 5, 1892, but by said decision was sent back to the Circuit Court of the United States with instructions to that court to determine whether the piers, as constructed by the Illinois Cenral Railroad Company, extended beyond the point of navigation in the waters of the lake. It then went back to the Supreme Court of the United States and was finally decided February 3, 1902, and the title of the Illinois Central Railroad Company to this pier was confirmed. If in the end the claim of title of the Chicago Dock & Canal Company was established and confirmed by the court, the City would then have to purchase, if terms could be agreed upon, and if terms could not be agreed upon it would have to bring condemnation.

Sixth: Sections 12 and 13 authorize a city or village to acquire shore lands by agreeing upon a boundary line dividing the lands, whether of natural or artificial formation, between lands to be taken by the city and lands to be taken by the shore owner or claimant. After agreement has been entered into the boundary line is confirmed by the Circuit Court if it is of the opinion that the rights of the public are duly conserved, and the title of the shore owner or claimant to the lands on the inner or land side of the boundary line is quieted and confirmed. The popular objection to this method of acquiring shore lands for harbor purposes is that the decree of court would have the effect of quieting the title of the Chicago Dock & Canal Company to all other artificially made or reclaimed lands which would not be required by the City for harbor purposes. Furthermore, this method of acquisition is impossible for the reason that the representative of the Chicago Dock & Canal Company has refused to enter into an agreement establishing such a boundary line.

In order to set forth clearly to the members of the com-

mittee just what the proposal of the Chicago Dock & Canal Company is, I beg leave to state the same as follows:

They propose to sell to the City for harbor purposes the east one hundred (100) feet of lot seven (7) of the 'Peshtigo dock addition. This strip, by survey, is shown to be five hundred and fourteen (514) feet long, running north and south. In addition, the Company will dedicate a strip of ground seventy-four (74) feet wide by nine hundred (900) feet long as an extension of Indiana street from the east line of Pesh-tigo court to the west line of the said one hundred (100) foot strip.

This dedication will be subject to the easement of the Chicago Railways Company in the west one hundred and seventy-two and nine-tenths (172.9) feet of said strip, which easement can be merged in the grant to said Company when it becomes necessary to extend the street car line out to the passenger and recreation pier. The Company will also dedicate a like strip of ground seventy-four (74) feet wide by nine hundred (900) feet long as a street extension of Illinois street from the east line of Peshtigo court to the west line of the said one hundred (100) foot strip. This dedication will be subject to the easement of the Chicago & Northwestern Railway Company for its tracks as at present laid down on said street and the right to extend them up to the west line of said one hundred (100) foot strip. This extension of the Railroad's tracks to the City's property will be necessary as a railway terminal connection for the handling of harbor freight and other railway purposes, and forms a part of the City's scheme of harbor development. The proposal further includes the transfer of the pier or breakwater extending from the southeast corner of said one hundred (100) foot strip south to the United States Government North Pier; the City to keep said pier or breakwater in proper repair. The acquisition of the one hundred foot strip will carry with it riparian rights. The City will also acquire whatever riparian rights there are to that portion of the extension of Indiana street which borders upon Lake Michigan. The price asked is \$300,000.00, and the

Company offers to take in payment therefor the City's harbor construction bonds at par.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved.

WM. H. SEXTON,
Corporation Counsel.

JULY 16, 1913.

TO THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND,
CHICAGO.

Gentlemen :

The application of Arthur A. Pecoy and the record of the police department submitted, indicates that on June 3, 1887, the applicant entered the service of the police department and on October 26, 1897 he was discharged. The record does not disclose the cause of his discharge, but it is immaterial for the purpose of determining whether or not the applicant is entitled to a pension.

It is apparent that Pecoy's claim for a pension is based upon the provisions of an act entitled, "An Act for the relief of disabled members of the police and fire department in cities and villages," approved May 24, 1877, in force July 1, 1877, as amended by an act approved May 10, 1879, in force July 1, 1879.

Your board is not constituted under the act referred to, but Section 12 of an act entitled, "An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities, villages and incorporated towns," approved April 29, 1887, in force July 1, 1887, as subsequently amended (under which your board is created) provides that all members of the police force * * * who upon the taking effect of this act shall be entitled to receive any benefit under the Act of 1877 referred to, shall receive no payments or benefits under said act, but shall, in lieu thereof, be entitled to the benefits provided for in this act.

Was Arthur A. Pecoy entitled to receive any benefits

under the Act of 1877 on July 1, 1887 when the present act went into force and effect?

Mr. Pecoy's application for a pension shows that he had served as a member of the police department of the City of Chicago for more than ten years prior to July 1, 1887. The precise question arose in the case of *O'Connor et al. v. Trustees of the Firemen's Pension Fund*, 155 Ill. App. 460, under the Firemen's Pension Act containing a similar clause saving the rights of firemen who were entitled to the benefits of the same Act of 1877 as amended. The court held in that case that there was nothing in the law to prevent one who had been discharged from getting a pension if he had theretofore served ten years. This case went to the Supreme Court and the judgment of the Appellate Court was affirmed, but on other grounds. (See *O'Connor v. Trustees*, 247 Ill. p. 54.)

If we should follow the opinion of the Appellate Court referred to, a serious inroad might be made upon the police pension fund. We are inclined to believe that the Appellate Court was in error in that respect and are unwilling at this time to hold that ten years' service in the police department without any further showing, entitled a person to the benefits of the Act of 1877 as amended.

In a very recent case decided by the Appellate Court involving the same parties as in the *O'Connor* case referred to, the court in effect reversed its former decision and held that to bring an applicant within the class of persons provided for under Section 7 of the Act of 1877, he would be required to show service for ten years and that he had continued his membership in the organization of the Police and Firemen's Relief Fund by (1) payment of all assessments before ceasing to be an active member; (2) compliance with the rules and regulations lawfully established by the board; and (3) payment of all assessments if he ceased to be a member. The court further said:

"Whether he should also show as contended by plaintiff in error, that he had become permanently disabled, it is unnecessary to decide." (See *Calder v. City*, No. 17837 Appellate Court First District.)

We believe that if the question were squarely put to the

court, the judgment of the Appellate Court in the O'Connor case would be reversed upon the latter point, for the reason that the Act of 1877 as amended in 1879 was one for the relief of *disabled* members of the police and fire department.

Section 7 of said Act of 1877 as amended is as follows:

“Any person who shall have served either the Police or Fire Departments of said city or village for the full term of ten (10) years, and shall have paid into the fund hereby provided for all assessments regularly made upon him by the Board of Trustees as required by this act, and the regulations of the said Board of Trustees passed in pursuance of this act, and shall have complied with all the rules and regulations lawfully established by the Board of Trustees in the same manner as if such person was an *active* member in said Police or Fire Department, may continue his membership in this organization, and be entitled to the benefits of this fund after he shall have ceased to be a member in either said Police or Fire Department, by complying with all the provisions of this act relative to the payment of assessments, etc., the same as prior to his ceasing to be a member of said departments, and the widow or children of such person shall be entitled to all benefits hereby secured to other members of this organization.”

It will be seen from the foregoing section that ten years' service in the department entitled a person to continue as a member of the organization created by the act, and to the benefits of the fund therein mentioned in the same manner as if he were an *active* member of the department, by complying with all of the provisions of the act relative to the payment of assessments, etc.

Under what conditions were active members entitled to the benefits of the fund created by said act?

Among other conditions Section 6 of said act provides as follows:

“* * * if any member of the Police or Fire Departments, while in the actual performance of duty or other person entitled to the benefits of this fund as hereinafter provided” (undoubtedly as provided in Section 7 hereinabove quoted) “shall become *permanently disabled*, so as to render proper his retirement from membership, a sum not exceeding six hundred dollars (\$600) per annum or such less sum, as in the judgment of the board, the fund

will justify, shall be paid to such member out of said fund; * * *."

Thus, *permanent disability* was a condition precedent to entitle a member of the organization to a pension whether he was an *active* member of the department, or an *ex-member* of the department who had served ten years.

The application filed with your board does not show the existence of any of the conditions precedent to entitle Mr. Pecoy to a pension.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 16, 1913.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Your Committee, at its last meeting, asked for a verbal opinion from the Corporation Counsel on the right of the city to seize the plant of the Chicago Reduction Company, on the termination of its existing contract for garbage reduction, which will occur on August 31st, 1913. Having in mind that the emergency had not yet arisen which could justify such an extreme measure, the Corporation Counsel did not consider it advisable to give an opinion in advance of the emergency. Since then, however, after full consideration of the status of the entire subject matter, it had so clearly been established by an examination of the authorities that such seizure would be unlawful, that we consider it proper now to forward the following opinion to your Committee so that the statement of the Corporation Counsel may not mislead the Committee.

In matters pertaining to the health of the community there is much wider latitude possible in the exercise of the police powers by the State or municipality than in any other class of cases. Yet, in spite of that, we can find no warrant in law for such a procedure as the seizure of this plant without invoking the right of eminent domain.

We had occasion very recently to give an opinion to the effect that this plant could be acquired by the city through condemnation proceedings under the right of eminent domain as delegated to the city by the state, but stated that the method prescribed by statute must be followed before possession can be secured.

The essential difference between the police power and the right of eminent domain is that the police power is exercised against things which have a tendency to be harmful or detrimental to society while the right of eminent domain extends to the things necessary, useful or advantageous. If the thing itself is bad or is located or placed in such a way that it affects the health or safety of the public, the police power may be directed against it even to the extent of seizing it and destroying it, but if the public covets it and wishes to possess it and use it for the benefit of the public the police power is of no avail. To use physical force to obtain possession of the plant under the fancied right of seizure under the police power would amount to a trespass for which every officer and employe participating therein would render himself liable for punitive damages.

Freund, in his work on police power, which ranks high as an authority, draws the distinction between the two powers in the following language:

“If we differentiate eminent domain and police power as distinct powers of government, the difference lies neither in the form nor in the purpose of taking, but in the relation which the property affected bears to the danger or evil which is to be provided against.

Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful, or as Justice Bradley put it, because ‘the property itself is the cause of the public detriment.’ ”

The text quoted above is supported by an abundance of

authority, the following being taken from a Pennsylvania case :

“The argument in this case took an extended range of discussion upon powers of the state, of eminent domain and police. In their leading features, these powers are plainly different, the latter reaching even to destruction of property, as in tearing down a house to prevent the spread of a conflagration, or to removal at the expense of the owner, as in the case of a nuisance tending to breed disease. In the first instance, the community proceeds on the ground of overwhelming calamity; and in the second, because of the fault of the owner of the thing; and in either case compensation is not a condition of the exercise of the power. The same general principles attend its exercise in other directions, and it is generally based upon *disaster, fault, or inevitable necessity*. On the other hand, the power of eminent domain is conditioned generally upon compensation to the owner, and for the most part is founded, not in calamity or fault, *but in public utility*.”

(*Philadelphia v. Scott*, 81 Pa. St. Rep. 80.)

In examining the authorities supporting the rule laid down above, we found a number of cases where the conditions seemed to warrant some such extraordinary procedure and where a course involving a physical taking was pursued, but we could find no instance where a court justified the action, no matter what the exigencies of the occasion.

In the case of *Spring v. Hyde Park*, 137 Mass. 554, the owner of a dwelling house occupied a portion of the building, and a tenant occupied the other part of same. Small-pox broke out in the family of the tenant, two persons being infected with the disease. Their condition was such that they could not be removed. The Board of Health was given authority to deal with such a situation in the language quoted below. It took possession of the house and furniture therein and converted it into a hospital. The following was the language of the statute :

“If the infected person cannot be removed without danger to his health, the board shall make provision for him as directed in the preceding section in the house in which he may be; and may cause the persons in the neigh-

borhood to be removed; and take such other measures as it judges necessary for the safety of the inhabitants.”

In passing on the propriety of the action of the Board of Health, the court said:

“The provisions contemplate that a contract will be made for the care of a person too sick to be removed, as by furnishing him with necessaries, nurses, etc., and, further, that the place where he is, with its immediate vicinity and the persons there found, will be subject to the regulations of the board of health. *They give no authority to take possession of the property of any one, to the exclusion of him who is entitled to the lawful possession.*”

Spring v. Hyde Park, 137 Mass. 554.

In a somewhat similar case the court held as follows:

“Where a city, which is authorized by its charter to purchase property beyond its limits for a pesthouse, seizes property for that purpose without the consent of the owner, it is liable for damages in trespass.”

Dooley v. City of Kansas, 82 Mo. 444.

There are numerous other cases to the same effect.

Davidson v. New Orleans, 96 U. S. 97.

Am. Print Wks. v. Lawrence, 23 N. J. L. 590.

Monongahela Nav. Co. v. U. S., 148 U. S. 312.

It cannot be said that the danger to the public health arising from the failure to properly dispose of the garbage of the city (the condition which it is suggested can be relieved by such summary seizure) is in any way caused by the property which is the subject of your inquiry.

In case such a proceeding was instigated by the City Council any officer or agent of the city participating in the seizure would render himself personally liable for exemplary damages. He would not be protected by the action of the City Council where it so clearly exceeded its powers.

Dillon on Mun. Corp., 5th Ed., Sec. 440.

Whether or not the City itself would be liable is a matter which depends largely on the methods and instrumentalities used. The general rule is that the municipality is not liable for the *ultra vires* acts of its officers even though such acts are directed by the City Council. (Dillon, Section 1648.)

But this general rule in some instances has been overcome by the peculiar circumstances of the case.

Yours respectfully,

LEON HORNSTEIN,

JOSEPH F. GROSSMAN,

Assistants Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JULY 17, 1913.

HON. EUGENE BLOCK, CHAIRMAN, COMMITTEE ON LOCAL TRANSPORTATION.

Dear Sir:

In your letter of July 7, 1913, you ask to be advised on certain questions of frontage consents, which have arisen in connection with pending street railway ordinances. We shall discuss the questions in the order in which they appear in your letter.

First: An ordinance authorizing the construction of an extension was called up and passed at a Council meeting. At the same Council meeting revocations of frontage consents were transmitted sufficient in amount to reduce the frontage below the majority required by statute. Some revocations were presented before and some after the passage of the ordinance. The question is, what effect such revocations have on the passage of the ordinance.

The courts have uniformly held that the consent of abutting owners, when required by statute is a condition precedent to the right to occupy streets, and that until this condition is complied with a street railway company has no authority to commence the work of construction. The procuring of the necessary frontage consents is jurisdictional, and unlike conditions subsequent, which may be waived by municipal authorities, the failure to secure sufficient frontage consents is fatal to the grant.

Booth on Street Railways, Section 24.

Roberts v. Easton, 19 Ohio Sta. Rep. 78.

Attorney General v. Chicago Horse & Dummy R. R. Co., 121 Ill. 638.

Poeple ex rel. etc. v. Newton, 58 N. Y. 439.

Wiggins Ferry Co. v. East St. Louis R. R. Co., 107 Ill. 450.

North Chicago Street R. R. Co. v. Cheetham, 58 Ill. App. 318.

Where consents are given for the construction of a street railway extension and where prior to the passage of an ordinance providing for such extension consents are withdrawn sufficient in quantity to bring the amount below the legal requirements, the courts have held that the city council was without power or authority thereafter to adopt the ordinance in question and that such ordinance was void and without force or legal effect.

Peo. ex Mahoney v. Decatur, Springfield & St. Louis Railway Co. et al., 120 Ill. App. 229.

See also *Bullock v. West Chicago Rapid Transit Co.*, 23 Chicago Legal News 147, where the court said:

“The petition is itself only a power of attorney to the common council in legal contemplation, and the signers thereof could revoke it at any time before it was acted upon.”

The authorities are uniform that the right to withdraw frontage consents continues to exist until such consent has been acted upon by the body or tribunal to whom such petition has been addressed.

In *LaLonde v. Board of Supervisors*, 80 Wis. 380, there was presented to the Board a petition signed by two-fifths of the voters, requesting said Board to submit to the voters at the next election the question of removing the county seat. The court said, at page 385:

“The learned circuit judge held that the Board had the right to allow persons who had signed the petition, to withdraw their names therefrom, or to strike their names from the petition when requested so to do by the signers before the petition was finally acted upon by the Board. Was that a correct view of the matter? We think it was in accord with common sense. * * * There is no good reason why a person who has voluntarily signed

a petition shall not have the right to withdraw his name before the Board finally acted upon it.”

To the same effect see:

Duluth v. Hanover, 42 Ohio Sta. Rep. 215.

Hays v. Jones, 27 Ohio Sta. Rep. 218.

Slingerlan v. Norton, 59 Minn. 351.

State v. County Commissioners, 66 Minn. 520.

Hord v. Eliot, 33 Ind. 220.

Black v. Campbell, 112 Ind. 122.

Nebr. v. Board of County Commissioners, 10 Nebr. 32.

Littell et al. v. Board of Supervisors of Vermilion County, 198 Ill. 205.

Theurer v. The People ex. Charles S. Deneen, 211 Ill. 296.

In *Simmons v. City of Toledo et al.*, 8 Ohio Cir. Ct. 535, certain persons withdrew their names from a frontage petition asking the city council to grant track rights to a street railway corporation. The request was made before the ordinance was passed. The court said:

“It is objected that parties had not the right to take their names from the paper after they had once signed. We think * * * that is a matter of right that a party would have the right to withdraw his name before the Council had acted upon the paper and passed the ordinance.”

Parish v. Traction Co., 23 Ohio Cir. Ct. Rep. 527, is also a street railway case. In this case the court said:

“As to Kohn Brothers and Creecraft withdrawals it is settled by the case of *Simmons v. Toledo*, 4 Cir. Sec. 69 (8 R. 535) that a property owner may withdraw his consent at any time before the Council has acted upon it and passed the ordinance.

We are therefore of the opinion that the parties had a right to withdraw their consent at any time before the final passage of the ordinance.”

Answering your question specifically the frontage consents revoked *before* the passage of the ordinance should be checked up and if you then find that there is no sufficiency after deducting such consents, then the ordinance is invalid for lack of sufficient frontage, in compliance with our stat-

ute. The frontage revoked *after* the passage of the ordinance should be disregarded.

Second: You also desire to be advised whether an ordinance would be valid if sufficient frontage is withdrawn after the passage of the ordinance, but prior to the mayor's approval.

I have carefully searched the books on this point but have not found any cases where this specific question was raised. I have found a few cases involving street railway grants and the rule has been laid down generally that "consent may be withdrawn at any time before the council has acted and passed the ordinance."

Simmons v. City of Toledo et al., supra.

Parish v. Traction Company, supra.

It would seem that this is a reasonable rule. Any other rule would lead to uncertainty and confusion and set at naught the action of the city council and make ordinances invalid which are valid at the time of passage and based on the necessary frontage required by law.

The person signing frontage petitions the city council to pass an ordinance and it would be manifestly unfair to permit such person to upset the action of the city council after the city council has done what such person has requested it to do.

Third: You state that a property owner having signed a frontage consent petition in the hands of agents of a street railway company subsequently revoked his consent by a document transmitted to the city council, and you desire to be informed whether such revocation is effective without giving formal notice to the agent to whom the consent was originally given.

Assuming this revocation was transmitted to the city council before the ordinance was passed, we are of the opinion that it is not necessary to give formal notice to the represen-

tative of the Traction Company to whom the consent was originally given.

Currie v. Atlantic City, 66 N. J. L. 140.

Yours respectfully,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 17, 1913.

HONORABLE HARRY E. LITTLER, Chairman, Committee on Harbors, Wharves and Bridges.

Dear Sir:

At the meeting of your committee on Monday, July 14, 1913, Joel W. Stevens, Esq., appeared as representing the claim of the Pattawattamie Indians to lands on the lake front. The claim of these Indians was presented before your committee in December, 1911, when the proposed ordinance fixing the rights between the Illinois Central Railroad Company and the South Park Commissioners was under consideration, and was also the subject of a communication addressed to the Mayor, dated December 18, 1911. The gist of this claim seems to be that the Indians in transferring the lands to the United States ceded only to the water's edge and made no cession of the waters of Lake Michigan or the submerged lands thereunder, and that in consequence thereof, the title to the waters of Lake Michigan and said submerged lands and such lands as have been reclaimed and filled in upon the bed Lake Michigan still remains in the Pokagon Tribe of the Pattawattamie Indians of Michigan and Indiana.

In a copy of the joint protest which was sent with the above communication to the Mayor, and which protest was addressed to the Congress of the United States, when a bill for a protecting breakwater to the Chicago outer harbor was under consideration in Congress in December, 1911, they made the following claim:

"The shores and beds of Lake Michigan enclosed within the prescribed boundaries of the State of Illinois

as admitted into the Union are not 'in whole or in part' the property of the United States or the State of Illinois, but are legally the property of the said remaining Pokagon Tribe of Pottawattamie Indians. There is no record to the contrary."

According to the said communication and protest, they rely upon the Greenville (Ohio) Peace Treaty of August 3, 1795, and the St. Louis Treaty of Peace, Friendship, and Limits of August 24, 1816. Their representatives quote from the Greenville treaty, as follows:

"Article 4. In consideration of the peace now established and of the cession and relinquishments of lands made in the preceding article by the said tribes of Indians, and the manifest liberality of the United States, as the great means of rendering this peace strong and perpetual; the United States relinquish their claims to all other Indian lands northward of the Ohio River, east of the Mississippi, and westward and southward of the Great Lakes and the waters uniting them, according to the boundary line agreed on by the United States and the King of Great Britain, in the treaty of peace made between them in the year 1783."

They fail, however, to call attention to a portion of Article 3 of the same treaty, which is as follows:

"And for the same considerations, and as an evidence of the returning friendship of the said Indian tribes, of their confidence in the United States, and desire to provide for their accommodation, and for that convenient intercourse which will be beneficial to both parties the said Indian tribes do also cede to the United States the following pieces of lands, to wit: * * * (14) One piece of land six miles square at the mouth of Chicago River emptying into the southwest end of Lake Michigan, where a fort formerly stood."

Article 1 of the Treaty of Peace, Friendship and Limits of August 24, 1816, provides as follows:

"The said Chiefs and Warriors (Pottawattamies and other Indian tribes), for themselves and the tribes they represent, agree to relinquish, and hereby do relinquish to the United States, all their right, claim, and title, to all the lands contained in the before mentioned cession of the Sacs and Foxes, which lies south of a due west line from the southern extremity of Lake Michigan and the Mississippi River. And they moreover cede to the

United States all the land contained within the following bounds, to-wit: beginning on the left bank of the Fox River of Illinois, ten miles above the mouth of said Fox River; thence, running so as to cross Sandy Creek, ten miles above its mouth; thence, in a direct line, to a point ten miles, north of the west end of the Portage, between Chicago Creek, which empties into Lake Michigan, and the river Desplaines, a fork of the Illinois; thence, in a direct line to a point on Lake Michigan, ten miles northward of the mouth of Chicago Creek; thence, along the lake to a point ten miles southward of the mouth of said Chicago Creek; thence, in a direct line, to a point on the Kankakee, ten miles above its mouth; thence, with the said Kankakee and the Illinois River, to the mouth of the Fox River, and thence to the beginning; provided, nevertheless, that the said tribes shall be permitted to hunt and to fish within the limits of the land hereby relinquished and ceded, so long as it may continue to be the property of the United States."

The treaty of July 29, 1829, in Article 1, provides as follows:

"The aforesaid nations of Chippewa, Ottawa, and Pottawattamie Indians, do hereby cede to the United States aforesaid, all the lands comprehended within the following limits, to-wit: * * * Beginning on the western shore of Lake Michigan at the northeast corner of the field of Antoine Caitmette, who lives near Cross Points, about twelve miles north of Chicago; thence, running due west to the Rock River aforesaid; thence, down the said river, to where a line drawn due west from the most southern bend of Lake Michigan crosses said river; thence, east, along said line, to the Fox River of the Illinois; thence, along the northwestern boundary line of the cession of 1816, to Lake Michigan; thence, northwardly, along the western shore of said lake to the place of beginning."

One other treaty made with the Pottawattamie Indians and not quoted from by their representatives in the communication above referred to, I consider decisive of the question at issue,—I refer to the treaty of October 27, 1832. Article 1 provides as follows:

"The Chiefs and Warriors aforesaid, cede to the United States, their title and interest to lands in the States of Indiana and Illinois, and in the Territory of Michigan, south of Grand River."

Article 2 makes reservations for certain chiefs and their bands, of a specified number of sections, but none of these are particularly described as bordering on Lake Michigan within the limits of the City of Chicago and apparently are, for the most part, located in the Territory of Michigan. By later treaties these reservations were ceded to the United States. The State of Illinois was admitted into the Union in 1816, and Section 2 of the enabling Act defined the boundaries of the new state as follows:

“That the said state shall consist of all the territory included within the following boundaries, to-wit: Beginning at the mouth of the Wabash River, thence, up the same, and with the line of Indiana, to the northwest corner of said state; thence, east with the line of the same state to the middle of Lake Michigan; thence, north along the middle of said lake to north latitude 42 degrees and 30 minutes; thence, west to the middle of the Mississippi River; and thence, down along the middle of that river to its confluence of the Ohio River; and thence, up the latter river along its northwestern shore, to the beginning; provided, that the convention hereinafter provided for, when formed, shall ratify the boundaries aforesaid.”

The Constitutional Convention held at Kaskaskia, August 26, 1818, ratified the above boundaries. It will be seen from the foregoing boundaries of the State of Illinois, that the submerged lands and waters of Lake Michigan, west of the middle line of said lake, running north and south, and south of 42 degrees 30 minutes north latitude, running east and west, which latter line coincides with the southern boundary of Wisconsin, extended east, are clearly within the State of Illinois, and since the treaty with the Pottawattamie Indians last above referred to, and which was signed October 27, 1832, provided for the cession to the United States of “their title and interest to lands in the States of Indiana and Illinois”, it conclusively follows that the parties to said treaty had in contemplation the boundary lines of the State of Illinois as legally established; and both the Supreme Court of the United States and the Supreme Court of the State of Illinois have held that the title to these submerged lands is in the State of Illinois. (*Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 435;

Revell v. People, 177 Ill. 468.) Consequently the above claim that the shores and beds of Lake Michigan within prescribed boundaries of Illinois, as admitted into the Union, are not the property of the United States or of Illinois, but are the property of the Pokagon Tribe, and that there is no record to the contrary, is without foundation. The Pottawattamie Indians, in more than eighty years since the treaty of 1832, have brought no suit for the recovery of the lands in Harbor District Number 1, or for the assertion of their rights therein. The claim of title now being set forth in their behalf is entirely too remote to merit serious consideration. I am, therefore, of the opinion that all their title and interest passed to the United States under the treaty of October 27, 1832, and thereupon enured to the State of Illinois under the Act of admission to the Union.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 18, 1913.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

You forwarded to this department an order recently introduced in the City Council and referred to your committee, requiring the City Comptroller to prepare payrolls and proceed to pay all city employes who were laid off in the year 1912 on account of the deficit occasioned in the city's finances by reason of the adverse decision of the Supreme Court in connection with the Juul Law. You asked to be advised as to the city's standing in the matter.

The order in question contemplates the payment of city employes who were laid off whether in the classified service or not. There can, of course, be no question whatever with regard to any employes who were not under civil service. If they were laid off for any cause whatever and failed to render services, they cannot be paid by the city at the present

time; such payments would amount to a gratuity which the city council has no right to grant. We, therefore, understand your inquiry to relate more particularly to those employes who were under the civil service and were required to take an enforced vacation for a while.

We could again dismiss a portion of this by referring you to section 12 of the Civil Service Act, which reads:

“Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days.”

Under this provision of the act, the right of the heads of departments to dismiss or lay off employes for thirty days without pay cannot be questioned no matter what the cause was for such action. In the present instance the lay off or suspension was caused by a lack of funds, and, in that respect, the right to take such action would have existed without resorting to the clause quoted above.

There is a difference in the liability of a municipal corporation for salaries in the case of employes than in the case of officers. Where a salary is attached to an office, it goes with the position and is not dependent upon the performance of actual service. On the other hand, the salary or compensation of an employe is intended for remuneration of actual services rendered, and, generally speaking, can only be recovered for services rendered.

Dillon on Mun. Corps. (5th Ed., Sec. 425).

There are some exceptions to this general rule as where a contract has been made for a fixed and definite period and in some instances where the employe has tendered his services under certain conditions and they have not been accepted.

The mere fact that a salary was fixed in the appropriation bill does not change the status, since ordinances fixing salaries are not in the nature of contracts. The rule that where the employe has not rendered services he is not entitled to compensation prevails in spite of the fact that an appropriation has been made for the full salary, and, unless he can show a right to continuous employment, he cannot recover merely because there was an appropriation made.

28 Cyc. 603.

Dillon on Mun. Corps. 423.

The form of the notice to the employe is also an immaterial matter, and it makes no difference whether he was "relieved from duty", "suspended" or "laid off."

"* * * but where an employe has no right to continuous employment because of lack of funds, and is laid off temporarily or put on short time to keep the expenses within the appropriation or because there is no work for him to do, he cannot recover for such time."

To hold, therefore, that a municipality is bound to pay its employes after they have been laid off for the period during which they rendered no services, would be tantamount to say that the municipality has no right to reduce its payroll when it finds itself unable to keep same within its income from taxes and other sources of revenue.

Since the city had the right to lay off employes in order to reduce expenses, and did so, it cannot now pay money to these employes for the period during which they rendered no service. The rule is absolute that the city cannot pay out money lawfully without consideration.

"It is a plain proposition of law, and one well understood, that in the discharge of their duties, the city council must act within the bounds prescribed by their charter, and if they exceed the powers conferred by the charter, such acts are nugatory. They had no power to squander or give away the funds or property of the incorporation, but all property within their control, belonging to the incorporation, must be honestly applied to the uses and purposes specified in the act of incorporation. The city council have no power to sell, or in any manner dispose of, the property of the corporation without consideration, and, in our opinion, they have no right to discharge a debt without payment, which may be held against parties who are solvent and responsible, where no controversy exists in regard to the validity and binding effect of the indebtedness."

Agnew v. Brall, 124 Ill. 312.

Town of Petersburg v. Mappin, 14 Ill. 193.

City of Chicago v. P. C. C. & St. L. Ry. Co., 244 Ill. 220.

Ludlow Valve Mfg. Co. v. City of Chicago, App. Court, (not yet published).

In view of the law as indicated by the above authorities,

there does not appear to be any way of passing a valid order or ordinance which will authorize the payment of compensation to employes laid off during 1912 in order to meet the financial stringency that existed at that time.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JULY 18, 1913.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

You referred to this department three contracts relating to the construction of the proposed bath house on 35th street near Ashland avenue, to ascertain whether the City Council had exceeded its authority in directing the Commissioner of Public Works to enter into these contracts, which involved an expenditure of more than the amount appropriated for the work, but on which, provided they agreed to it, the contractors were to wait for the payment of the excess until additional appropriations were made.

The voters approved a bond issue of \$380,000 for improvements planned by the Department of Health, and the City Council appropriated \$20,000 of this amount for the building of this bath, the remainder being appropriated for other purposes.

The bids of the lowest responsible bidders for the work aggregated \$33,847.00, whereupon the City Council passed the order in question, adding another clause to the effect that the sum of \$17,500.00 should be included in the appropriation bill for 1914 "to provide for the liabilities under these contracts."

So far as the order relates to the appropriation bill of 1914, it should be stated at the outset that it has no binding force whatever. We quote the language used, however, for the purpose of arriving at the intention of the City Council as to the creation of a present liability.

The statute governing the subject reads as follows:

“No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, * * *.”

There is also a provision of the Criminal Code relating to public officers which prohibits them from “contracting, directly or indirectly, for the expenditure of a greater sum or amount of money than may have been, at the time of making the contracts, appropriated or set apart by law or authorized by law to be contracted for or expended upon the subject-matter of the contracts. * * *”

It is quite plain that the purpose of the law was to prevent municipal officers from making contracts involving a greater expenditure than the amount of the appropriation, and the only question in this case is whether the clause thrusting the entire risk on the contractor makes the proposed contracts exceptions to the rule.

It has been the custom for many years to make contracts for supplies with a provision in same to the effect that the purchases under such contract might in the discretion of the officer of the city making same, continue for a certain period into the following year, payment to be subject to an appropriation therefor under the next appropriation bill. They do not contemplate the consumption of more than is appropriated for during the current year.

It has always been a question whether such a contract is legal, aside from any point as to the appropriation, for so far as it extends into the following year, it might be held to come within the definition of an option contract void under the statute. (*Kerting v. Hilton*, 51 Ill. App. 437.)

Such contracts, however, may be regarded as excusable on the question of the lack of an appropriation because they create no present liability. Moreover the contract price is based on units which come within the amount of the appropriation unless the contract is continued. The rule is that where

no present liability is created, as in the case of contracts for light or water extending over a term of years, a contract may be entered into in advance of an appropriation, on the theory that no liability accrues except as the service is rendered from month to month.

Cain v. City of Wyoming, 104 Ill. App. 538.

City of East St. Louis v. Flanigan, 26 Ill. App. 449.

Town of Kankakee v. McGrew, 178 Ill. 74.

Again, they may be excused on the theory that whatever extension is made into the next year, is a new contract entered into before the appropriation bill has passed, the City Council ordinarily authorizing such extension. Such a contract may be upheld.

City of Danville v. Danville Water Co., 180 Ill. 235.

In the present instance, however, it is proposed to go farther than this. The wording of each (with the exception of price, etc.) is as follows:

“The City of Chicago hereby agrees, in consideration of the covenants and agreements specified to be kept and performed by the party of the first part, to pay to said party of the first part when this contract shall be wholly carried out and completed on the part of said contractor, and when said work shall have been accepted by the Commissioner of Public Works, Twenty-three Thousand One Hundred and Fifty-four (\$23,154.00) Dollars, for the entire work complete, it being understood by and between the parties hereto, that no payments will be made for any work hereunder, in excess of the amount of money available, in accordance with the appropriation of the City Council, passed January 2, 1913, (which said appropriation will be pro rated among the contractors for plumbing, and steam heating on said building and the undersigned), until a further appropriation for same shall have been made by the City Council of the City of Chicago, all of which is in accordance with an order of the City Council passed June 2, 1913, and published on page 688 of the Journal of Proceedings of the City Council.”

How can the above be understood in any other way than as a contract for the whole of the work for a stipulated price, part of which shall not be paid until an additional appropriation is made? Taken in connection with the counsel order,

which says that the bidders should "agree to wait for payment, for money due in excess of the amount available in 1913 Budget, until an appropriation for same shall have been made," and that an appropriation "to provide for the liabilities under these contracts" shall be made in 1914, it must be understood as being a contract for a larger amount than the appropriation warrants.

Such being the case, we are compelled to hold that the officers of the city have no right to enter into the proposed contracts, even though the City Council has directed them to do so.

We are informed that the work has been started and is already well along. A way out of this difficulty, without injustice to the contractors, might be found by contracting for a part of the work only.

We return herewith the contracts, specifications and plans submitted to us.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JULY 19, 1913.

HON. EDWARD COHEN, City Collector.

Dear Sir:

Your communication dated July 14, 1913, to this office relative to whether or not a license is necessary to operate a garage wherein the American Express Company keeps a number of automobile trucks for the exclusive use of its own business, has been assigned to me for reply.

Garages are licensed under Article VIII of general ordinances, viz., Sections 2683, etc., of the Chicago Code of 1911, as amended July 17, 1911, Council Proceedings, page 962.

Section 2 of the amended ordinance is in part as follows:

"Such application shall also contain the location of the place at which it is intended to keep such garage and the number of vehicles to be kept in such garage for the

purpose of letting for hire or reward, together with a description of the style or type thereof."

Section 3 of said amended ordinance is as follows:

"Section 3. For all garages where vehicles are kept, ready for use and where rent is paid to the keeper thereof for such keeping, or where vehicles are kept to be let out for hire or reward, or where vehicles are kept ready for use and where rent is paid to the keeper thereof and where vehicles are kept to be let out for hire or reward, the license fee shall be twenty-five dollars per annum."

This ordinance as amended only concerns garages where vehicles are kept ready for use, and where rent is paid to the keeper thereof or where such vehicles are kept to let out for hire or reward.

Therefore, we are of the opinion that there exists no ordinance making it necessary for any person, firm or corporation keeping or owning auto cars or like vehicles which are used exclusively in the operation of their own business, to secure a license for the garage wherein they are kept.

The same conclusion is reached by reasoning by analogy from the ordinance governing the licensing of public cars, express wagons, etc., namely Section 2616 of the Chicago Code of 1911, which specifically exempts such vehicles from license requirements when they are used solely in the operation of a private business, as will be seen by the following language:

"Provided, however, that nothing herein contained shall be held to require a license for any vehicle or vehicles rented to any person or corporation for the purpose of transacting the business of such person or corporation, solely, but if any such vehicle be employed in and about the business of more than one person or corporation for the purpose of transporting or conveying any of the articles hereinbefore in this section described, in such case any such vehicle shall be considered a public cart."

Hence, garages containing vehicles so used or vehicles used in private business solely, are not required to be licensed.

Very truly yours,

M. W. CAGNEY,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 21, 1913.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

You have asked to be advised concerning the authority to transfer the funds of the city from one of the city's depositaries to another. This question has arisen by reason of the fact that the County Treasurer recently remitted the sum of one million two hundred fifty thousand dollars for taxes, thereby raising the balance in the depositary of the city funds which at the present time is the active bank, to an unduly large sum; and the ignoring of the transfer warrants drawn by the Mayor and City Comptroller against the same for the purpose of distributing a portion of this balance among other depositaries. It seems that you, in the said transfer warrants, designated four banks in each of which there was to be deposited the sum of one hundred thousand dollars drawn from the active bank. The city treasurer declined to honor the warrants, and instead of that deposited one hundred thousand dollars in each of five banks on his own motion, said five banks being city depositaries.

The question presented is whether the City Comptroller or the City Treasurer is the officer who is charged with the responsibility of making the transfers in question. It must be quite plain that in case the transfer of funds from one bank to another is left to the discretion of the City Treasurer, who has no means of knowing before hand what warrants are to be drawn or how much money will be received, there will be a large loss of interest to the city on account of the fact that the active bank pays interest only on the minimum amount deposited therein from month to month instead of on the average monthly deposits.

The authority for designating city depositaries and relieving the Treasurer of responsibility for the safe keeping of funds within the same is based on section 5 of part II of the Act of 1905, known as Article XII of the Cities and Villages Act.

This provides for advertising for bids for interest upon the money of the city to be deposited in banks, such bids to be reported to the city council for awards to be made by

the city council to the highest and best responsible bidder or bidders.

It then provides that the city council shall have power to pass all necessary ordinances to carry into effect the said provisions of the statute and that the City Treasurer shall be discharged from all responsibility for all moneys deposited by him pursuant to the ordinance or ordinances of the city council, with depositaries named and qualified as provided for by statute.

The Act further provides that when money is once deposited in such depositary or depositaries no check or draft shall be drawn against such deposits unless accompanied by a warrant attached thereto drawn in accordance with the provisions of the Cities and Villages Act.

In pursuance of the authority thus vested in the city council, there were enacted certain ordinances which appear in the Chicago Code of 1911 as sections 63, 64, 65 and 66, which are designed to prescribe a method for depositing funds in the various depositaries after they have been selected by the city council, for transferring funds from one bank to another, and for withdrawing funds for the purpose of having cash on hand in the Treasurer's office.

Section 66, which provides for an Equalization and Transfer Fund, it is clear has two objects in view:

1. The speedy transfer of money from one depositary to another. The words "in case of necessity" in said section really refer to a contingency where the comptroller might become aware that the money was unsafe in such a depositary, that it was liable to fail or that for some other reason it was advisable to withdraw the city's money, and this provision was made for the purpose of drawing out the money in any such bank or banks at once and depositing same in another bank or banks.

2. The active bank designated each month would sometimes not have sufficient funds to meet the requirements and it would become necessary to transfer funds from other banks to this; and on the other hand, it might have more than enough so that it would become advisable to draw from the active bank and deposit in the other depositaries.

This transfer of funds from one bank to the other is made necessary also by the fact that under the arrangement made with the depositaries the active bank pays interest on only the minimum amount deposited, whereas the other banks pay on the average daily deposits from month to month.

Under the ordinance in question the authority to make these transfers is given to the Mayor and Comptroller. It is a question entirely for their judgment and not for the City Treasurer. It is their judgment which determines the apportionment of the city's deposits among its various depositaries.

The words in section 6 "or for the purpose of the protection of the city's interests" refer to a discretion vested in the Mayor and Comptroller if in their judgment they consider it proper to make such transfer.

Inasmuch as this is a mere transfer of funds from one depositary to another and not a payment, the warrant by which such fund is drawn from one bank to be deposited in another is drawn necessarily in favor of the City Treasurer.

The City Treasurer is required under section 66 to keep an account known as the "Equalization and Transfer Fund" to which he charges such warrants when he receives same, and when again deposited in the depositary designated by the Mayor and Comptroller, he credits the said account with such re-deposit "in one or more of the other depositaries."

The entire control and authority for the transfer of funds from one bank to another is vested in the Mayor and Comptroller. The Treasurer has not and cannot exercise any discretion in the premises. The express power is given by ordinance to the Mayor and Comptroller, and the City Treasurer is used only mediately to make the transfer, but nowhere is he given any further authority.

It would seem that the authority of the Mayor and City Comptroller, under the ordinances, cannot be questioned. Even if it should be assumed that there is insufficient statutory authority under section 5 of the Act of 1905, the necessary authority would still exist under the original Cities and Villages Act whereby section 20 of Article VII, the City Treasurer is required to perform "such other duties" and be subject to such other rules and regulations as the city council

may from time to time, by ordinance, provide and establish.”

Such being the case, there is no ground whatever for refusing to honor the orders or warrants drawn in proper form under section 66.

The point that has been raised to the effect that the instruments drawn are not in strict conformity to the requirements of said section cannot stand in the way of the Treasurer’s plain duty.

The warrants are in a form which makes it possible for the treasurer to withdraw the moneys which the Mayor and Comptroller desire to have transferred, and therefore he is bound to live up to the spirit of the law contemplating that he should deposit the money subject to the control of the Mayor and the Comptroller.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 21, 1913.

HON. JOHN McWEENY, General Superintendent of Police.

Dear Sir:

In reply to your letter of February 5, 1913, to this office, will say that we see no legal reason why private detective agencies should not take out a city license as provided by Section 756 of the Chicago Code of 1911. While we can find no adjudicated cases on detective agencies in this state still the supervision of such agencies is necessary as a police regulation, and many other states having more strict laws than the Chicago city ordinances have held such laws to be valid.

A detective is defined by the American Ency. Dic. as

“One of a body of police officers usually dressed in plain clothes to whom are entrusted the detection of crimes and the apprehension of offenders.”

In Words and Phrases, Vol. 3, page 2056, we find the following:

“ ‘Detective’ is defined by Webster as a person fitted for or skilled in detecting; * * *. The literal thing understood by the word ‘detective’ in common affairs is a person who is able and has the facilities to detect criminals with a skill not possessed by non-professionals. (*Byrnes v. Mathews*, 12 N. Y. St. Rep. 74, 81.)

“A private detective is a person engaged unofficially in obtaining secret information for or guarding the private interests of those who employ him. (Cyc. of Law & Procedure, Vol. 14, 234.)”

As to the extreme care that should be exercised in the granting of a license to a private detective, the court in deciding that point in the case of *Smith’s Petition*, 5 Pa. Dist. 465, 467, where the court says in part as follows:

“A detective is a person experienced in the essentials of the business he proposes to engage in, acquainted with the methods and habits of criminals, familiar with the privileges and duties of officers, * * * possessed of the requisite courage, etc., mindful of the rights of citizens and of the extent and limitation of the powers of peace officers and that he is a person of unblemished character, * * * above the suspicion of having been, or becoming implicated in blackmailing schemes or the bringing of prosecutions for the purpose of settlement and extortion; discreet, honest, truthful and reliable. (14 Cyc. 235.)”

The authority to license and regulate private detective agencies by ordinance is granted under the various clauses of Section 1, Art. V, Ch. 24 R. S. of Illinois.

More especially clause 4, “To fix the amount, terms and manner of issuing and revoking license.”

Clause 66. “To regulate the police of cities and villages, and pass and enforce all necessary police ordinances.”

Clause 68. “To prescribe the duties and powers of a superintendent of police, policemen and watchman.”

Clause 98. “To pass all ordinances, rules, and make all regulations proper or necessary, to carry into effect the powers granted to cities or villages with such fines or penalties as the City Council or board of trustees shall deem proper, etc.”

It will be seen from the above enumerated clauses and

other clauses of the Cities and Villages Act, that the City of Chicago has ample power to regulate, etc., by ordinances. Such power and authority is more distinctly seen by the decisions interpreting the above and other clauses of said Act. This is more especially true in the case of *Spiegler v. City of Chicago*, 216 Ill., p. 114, on page 126, where the court says:

“The city has power to pass all ordinances which would be conducive to the promotion of health, safety and welfare of its inhabitants.”

There was no specific authority to compel owners of oil tank wagons to attach drip pans to their wagons but the court held under clause 66 that the city had ample authority to regulate and declare as to drip pans, etc., and in that case it reviews the authorities as to police powers.

In the case of *City of Chicago v. Kleuver*, 257 Ill. 317, there was no express authority granted to the city to compel the owners of automobiles, etc., to obtain a license, but the court said the city had ample power under clause 66 and cites many authorities. And in the case of the *City of Chicago v. Shaynin*, 258 Ill. 69, the decision was relative to the operating of a free museum of anatomy. There existed no specific authority under Article V to so regulate by ordinance but the court said the city had ample authority under clause 66 and cites many authorities.

The Supreme Court of Illinois in construing various cases has applied clause 66 as in the case of *City of Chicago v. Gunning System*, 214 Ill. 628, stating that the hanging of sign boards, etc., could be regulated under said clause. Also the sale of cigarettes as is seen in *Gundling v. City of Chicago*, 175 Ill. 340. Also *McPherson v. Village of Chebanse*, 114 Ill. 46, which decision states that a village had authority by ordinance to close places of business on Sunday under said clause 66. Also, the *City of Chicago v. Bowman Dairy Company*, 234 Ill. 294, wherein it was decided that the city could by ordinance, under clause 66, declare that milk bottles should have a specified capacity. Also, the case of *Ritchie & Company v. Wayman*, 244 Ill. *id.* 509, wherein the court upheld the women's ten-hour labor day law as being under the police power.

Upon inquiry from your department, we find that some of the local abuses complained of as against private detective agencies are that certain people who may or may not be private detectives but pose as such are guilty of blackmailing.

Second: That some private detective agencies mulct their clients without returning any or very unsatisfactory services for the money given them for such work.

Third: That many of said detectives carry concealed weapons.

Fourth: That they frequently arrest or pretend to and do make false arrests.

Fifth: That frequently the regular police officers of the city see men acting in a suspicious manner and upon interrogating them find that they are private detectives by said men producing their identification card as provided by the ordinance and without said identification cards it would be difficult to recognize them as such detective as any person then could state that he is a private detective.

It should be borne in mind that Section 764 of the Chicago Code of 1911 has the following provision:

“Providing, however, that this chapter shall not apply to special or private policemen or watchmen, or other persons engaged only in the business of doing police duty, and not in the detective or secret service business.”

It will be seen from the above enumeration of abuses that if there is any one cause which would call for the exercise of the police power, the same would certainly be the regulation, etc., of private detective agencies.

Therefore, we are strongly of the opinion that said ordinances relative to detective agencies, Ch. 19, Chicago Code of 1911, are reasonable and valid and should be enforced.

Yours respectfully,

M. W. CAGNEY,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 21, 1913.

JAMES MILES, Esq., Chairman, Technical Board (Streets).

Dear Sir:

Your communication of June 27, 1913, has been assigned to me for reply. In the communication you request that we advise you as to the construction of the first paragraph of section 995 of the Chicago Code of 1911, which is as follows:

"995. Vessels for garbage, ashes, etc.) It shall be the duty of every owner or his agent or occupant of any house, building, flat, apartment or tenement in the City of Chicago where persons reside, board or lodge, or where animal or vegetable food is prepared or served, and which is a private residence, to provide for such house, building, flat, apartment or tenement, and at all times to maintain in good order and repair a separate vessel or vessels for garbage, and a separate vessel or vessels for ashes and miscellaneous waste, of the material, construction and capacity prescribed in section 996 of this article, and in number proportioned as follows:"

You further state that the wording of this section has resulted at times in the shifting of responsibility. The difficulty in question is over the construction of the word "or", which has been frequently construed by our Supreme and Appellate Courts in various ways to meet the requirements in each case.

"Or" is frequently interpreted so as to have the meaning of "and" as will be seen in the case of *Ayers v. Chicago Title & Trust Company*, 187 Ill. 42, p. 50. Also in *Kindig v. Smith*, 39 Ill. 300.

It cannot be so interpreted in this section 995, for that is plainly not the intent of the enactment and to give it this interpretation would not lead to a logical conclusion.

The word "or" has been frequently interpreted to mean "to wit" or "that is to say." It is given this construction and held to be used in the sense of explaining that which precedes the word "or", and gives that which precedes the same significance as that which follows it as will be seen by reference to the case of *People v. Latham*, 203 Ill. 9, p. 18, and *People v. Nordheimer*, 99 Ill. 553, p. 560.

It has been more frequently construed to be used in its

original and disjunctive sense and corresponds with "either" meaning "one" or "the other", but not "both", as will be seen by a reference to the case of *Kuehner v. City of Freeport*, 143 Ill. 92, p. 98, in which the Supreme Court had under consideration a special assessment ordinance, and the court said in part, as follows:

"The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise."

Therefore, we are of the opinion that the word "or" must be construed in reference to section 995 of the Chicago Code of 1911 in its original and disjunctive sense and corresponding with "either", meaning "one" or "the other" and that this section casts the duty of providing garbage cans upon either the owner, his agent, or the occupant.

You state in your communication that the better results would be secured if the owner or agent were held solely responsible for furnishing refuse cans. If this would be the better way the ordinance might be amended by striking out of the same word "occupant" wherever it appears, but it would seem to us that the same result can be attained by only enforcing the ordinance as against the owner or his agent.

We might call your attention to an opinion by Caverly, J. of the Municipal Court of Chicago that the occupant alone is required to furnish the cans. We, however, disagree with the ruling in that case.

Respectfully,

M. W. CAGNEY,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JULY 24, 1913.

HON. EUGENE BLOCK, Chairman of the Committee on Local Transportation.

Dear Sir:

You ask to be advised whether the Committee on Local Transportation in its investigation into alleged irregularities

in the accounts of the traction companies under the resolutions introduced in the city council by Alderman Kunz has authority to go into the books and records of the traction companies, prior to February 11, 1907.

The traction ordinances of February 11, 1907, which in effect are partnership contracts, provide for the taking over of the property of these companies at an agreed price and then provide for their rehabilitation, maintenance and operation and finally for a distribution of the proceeds.

The rights of the city as a partner do not depend in any way on the conduct of the business, or the character of the men running the business, prior to the date of the passage of the ordinances.

For the purposes of this investigation there does not appear to be any reason at the present time for going back of that date to investigate anything that occurred in the affairs of either of the companies before that. There might have been the grossest misconduct and irregularity in the management of the business of either one of these companies before that time, and yet, so far as appears at the present moment, the city is not concerned with it and has no right to demand an investigation of the books of account or records of these companies prior to that time.

We do not mean to say that no condition could arise where such a demand would be proper. In case it should appear at any time that there was a conspiracy to defraud the city out of its just share of the proceeds, the city would have the right under the law to go back to the very inception of the conspiracy, no matter how far in the past that may have been. There are other conditions which could be named that might make it proper to extend the inquiry to the period before the passage of these contract ordinances. But that right can only be asserted in case it should develop in a judicial proceeding that something had transpired which makes it proper to go back in order to throw light on the questions at issue in the suit itself.

Aside from such a contingency as is suggested above the only other way in which the city could claim the right to investigate the affairs of these companies before said date would

be in case the ordinances themselves exact that privilege. We have scrutinized the ordinances with a view to ascertaining whether there was anything in them that provided for such an investigation, but we are unable to find any provision of this kind.

As matters stand at present, therefore, we see no way in which your committee can justly claim the right to examine the books or accounts of these companies prior to February 11, 1907.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
BRYAN Y. CRAIG,
Acting Corporation Counsel.

JULY 24, 1913.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

In connection with the opinion of this department of the 19th inst., relative to the city's rights in certain streets and alleys south of Vincennes Road and north of 87th street, which are claimed as their property by the Chicago and Western Indiana Railroad Company and the Belt Railway Company of Chicago, I wish to say that proper maps showing their right of way for elevation purposes have since been furnished by said railroad companies and from the maps so furnished it appears that the streets and alleys in the subdivisions mentioned in the ordinance of November 1, 1881, are now all occupied and used for railroad purposes by said companies and will continue to be so used after the tracks have been elevated.

As stated in the former opinion, the ordinance of November 1, 1881, does turn over to said companies the use of all of said streets and alleys as soon as they shall have acquired all the land abutting thereon. That this condition has been complied with is evidenced by the purported plat of subdivision filed for record by said companies March 29, 1900.

The ordinance of July 13, 1908, which is now to be amended in part must be held to be a ratification of the privileges granted by the terms of the ordinance of November 1, 1881, and so long as the land continues to be devoted to railroad purposes as it is today I am of the opinion that the privilege to use said streets and alleys cannot be disturbed. The maps furnished which accompany this communication should be made a part of the ordinance now under consideration by your Honorable Body, as amended July 14, 1913.

For your information I transmit herewith plat prepared by Map Department which shows the streets and alleys in question as they still appear upon the city's atlases.

As stated in the former opinion, none of the streets and alleys in this territory except part of "Holland Road" and 87th street (for which other lands equal in area are dedicated) is involved in the pending ordinance. All of the other streets and alleys shown on the plat of the Map Department as still existing, come under the provisions of the ordinances of November 1, 1881 and July 13, 1908, to which attention has been called.

The amendment asked for and agreed to as part of the amendatory ordinance, July 14, 1913, does preserve the city's rights in all of said streets and alleys in the manner indicated by the former opinion of this department, i. e., whenever they cease to be used for railroad purposes.

Very truly yours,

NICHOLAS MICHELS,

Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,

Acting Corporation Counsel.

JULY 19, 1913.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO:

Gentlemen:

In compliance with the directions of your Honorable body to render an opinion as to whether the city's rights in certain streets and alleys lying within the boundaries of a

subdivision known as the "Chicago and Western Indiana Railroad Company's Subdivision of part of Section 33, Township 38 North, Range 14, East of the Third Principal Meridian," would be protected by adding the following amendment to the ordinance now under consideration providing for the elevation of the tracks of the Chicago and Western Indiana Railroad Company and the Belt Railway Company of Chicago, between 81st and 87th streets.

Said proposed amendment reads as follows:

"It is hereby made a special provision of this ordinance that nothing herein contained, nor anything contained in any of the above mentioned ordinances, shall be construed as a waiver or abandonment of any rights of the City of Chicago in and to the streets and alleys lying within the boundaries of the purported subdivision known as the "Chicago and Western Indiana Railroad Company's Subdivision of part of Section thirty-three (33), Township thirty-eight (38) North, Range fourteen (14), East of the third (3rd) Principal Meridian," said Subdivision being recorded in the office of the Recorder of Deeds of Cook County, Illinois, on March 29th, 1900, as Document number 2941409."

In order that your Honorable Body may act understandingly in the premises I deem it necessary to refer briefly to the following ordinances under the terms of which said railroad companies may seek to justify their act of vacating certain streets and alleys lying within the lands owned by them between 81st and 87th streets, by the plat and deed, recorded March 29, 1900.

1. By the ordinance of the trustees of the town of Lake, passed November 1, 1881, authority was:

"* * * granted to said R. R. Co. and the C. & W. Ind. Belt. Ry. Co., jointly and severally in the territory bounded on the south by the south line of the town of Lake (87th street), on the west by Wallace street as laid down in the plat of Sission and Newman's Subdivision of South Englewood, till it reaches, if extended, the north side of Vincennes avenue and from thence north to the center line of Wallace street at 81st street, on the east by the east line of the Seymour estate subdivision of the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of S. 33, T. 38 N., R. 14, to the north-east corner of said W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, and from that point

west to the northeast corner thereof; thence northwesterly to the northeast corner of lot 5 in Sutherland's subdivision of part of the N. W. $\frac{1}{4}$ of said section 33 and continued to an intersection of the main line of said R. R. Co.

"The streets and alleys south of Vincennes avenue whenever the company shall acquire all the land abutting thereon may be considered as vacated to that extent and used by said R. R. Co.'s for railroad purposes.

"Before what is known as Holland settlement road shall be appropriated by the company, it shall put in good condition for travel, 87th street, where Holland road intersects it west to Wallace street, and Wallace street from said intersection to Vincennes avenue."

2. By section 9 of the ordinance of July 13, 1908 under the terms of which said railroad companies are required to elevate their tracks within the territory involved, which provides as follows:

"Any and all portions of any street, avenue, alley or other public way that extend into, upon or across any part of the right-of-way of said railways or railroads at any place where said railways or railroads are to be elevated as hereinbefore provided (except such portions of the streets and avenues as are to be used and occupied by subways to be constructed as provided in Section 4a hereof) whether such street or avenue is to remain unchanged or to be diverted as in this ordinance provided, shall be and the same are hereby vacated and discontinued so far as the same lie within the lines of the rights-of-way of said railway and railroad companies; and the City of Chicago shall take and prosecute to a conclusion any and all steps or proceedings that are or may be necessary to effect such vacation; * * *".

The ordinance now before your Honorable Body is amendatory of the ordinance of July 13, 1908 in so far as it provides for the dedication of property for public uses which the original ordinance did not require to be dedicated and in requiring the City of Chicago to reconvey to the Chicago and Western Indiana Railroad Company certain lands, pieces and parcels of property which were conveyed by it to the City under the terms of the ordinance of July 13, 1908, to be used for public streets, but which are not required for such purpose under the terms of the amendatory ordinance.

The only property devoted to public uses in the disputed

strip which is directly affected by the proposed amendment is part of "Holland Road" and a portion of 87th street connecting therewith and running west to a point 132 feet west of the center line of Stewart avenue. For those parts of said streets which are vacated similar portions are dedicated. All other streets and alleys involved are not affected by the amendatory ordinance, but come under the terms of the ordinance of November 1, 1881 or under the provisions of the ordinance of July 13, 1908, hereinbefore given.

Without doubt the companies base their right to occupy such streets and alleys upon the ordinance of November 1, 1881 and upon the additional authority granted them by the provision of the ordinance of July 13, 1908 hereinbefore given.

Manifestly no definite action was ever taken either by the Trustees of the Town of Lake or the City Council to vacate any streets and alleys within the territory in question.

The general terms of the two ordinances are too indefinite to warrant the conclusion that any of said streets and alleys are no longer in existence within legal contemplation. On the contrary, everything points to the fact that the municipal authorities intended to grant only the use of such streets and alleys for railroad purposes.

The Company's plat recorded March 29, 1900 does not change this situation in the least. The plat and deed of vacation are void in so far as they attempt to affect adversely any public rights in the streets and alleys shown as vacated on said plat, and the city may without doubt re-establish its rights in them whenever they cease to be used for railroad purposes.

While it is true that our courts have held that municipal authorities may not grant rights in public streets to individuals or corporations to the exclusion of the public, I am of the opinion that the city would now be held to be estopped from asserting its rights in any of these streets and alleys so long as they are occupied by said railroad companies under the provisions of the ordinance of November 1, 1881.

However, assuming that the proposed amendment seeks to safeguard the city's rights as they may develop in the fu-

ture, I think it is proper and should be added to the amendatory ordinance.

In conclusion, in order that your Honorable Body may be fully advised as to the companies' intentions under the amendatory ordinance, a plat should accompany the same showing the extent and limits of the property to be affected by track elevation.

Although such plat has repeatedly been asked for and promised, it has not as yet been furnished and I am, therefore, unable to determine what streets and alleys are to be occupied under the terms of the ordinance.

Yours very truly,

NICHOLAS MICHELS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JULY 26, 1913.

HON. EDWARD COHEN, City Collector.

Dear Sir:

We are in receipt of your favor of the 18th instant relative to collecting license fees from James O'Leary for conducting a public market at Fifty-second and Halsted streets.

The undersigned learned from an interview with Mr. O'Leary:

1. That he owns the ground on which said market is conducted.
2. That there are two meat markets therein, the managers of which pay him 50c and \$1.00 a day for the privilege of selling their meats there.
3. That there are also two fish stands, on which fish are sold on Thursdays and Fridays by licensed peddlers, who pay him 10c a day each for the privilege of selling fish for the period of twenty-four hours.
4. That there is also a fruit and vegetable stand conducted by farmers, who pay him 10c a day for each wagon.
5. That there is also a delicatessen store, the owner or

concessionaire of which pays him 50c a day for similar privileges.

6. There is also a dry goods department operated by a concessionaire who pays him a small sum for the privilege of selling goods.

Assuming that Mr. O'Leary's statement is true, clearly he is not personally liable for any license fee whatever, inasmuch as he is not the seller of any of the articles within the above enumerations. He is simply the landlord who rents the space.

With the managers of the meat markets and delicatessen store, however, the rule is different, for Sections 1320, 1321 and 1323 of the Chicago Code of 1911 expressly state that any person "who shall carry on, engage in or conduct the business of keeper of what is commonly or generally known as a meat market" or "delicatessen store" shall obtain a license.

As to the peddlers, inasmuch as they, as above mentioned, are licensed peddlers or should be, they are probably exempt, under the privileges granted by sections 1760, 1762 and 1763 of the Code from obtaining any additional license for the purpose of selling their wares in the market enclosure.

We are of the opinion, therefore, that the proprietors of the meat markets and delicatessen store only are required to obtain licenses in conformity with the said sections 1320, 1321 and 1323.

Yours respectfully,

EDWARD J. QUEENY,

Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,

Acting Corporation Counsel.

JULY 28, 1913.

HON. HUGO F. PITTE, Chairman, Committee on License:

Dear Sir:

We return herewith the ordinance prohibiting certain classes of entertainment in restaurants and public places of refreshment, which was under consideration by your committee this afternoon.

In view of the opinions expressed by the members of the

committee, all of which seem to be in harmony on the point discussed, we have taken the liberty to add a few words to section 2, which prohibits dancing in restaurants and public places of refreshment, so as to exclude the possibility of the ordinance being construed as prohibiting dancing in a private room of a hotel or other place which was especially engaged for a banquet or other entertainment.

You have asked for an opinion on two points, first, whether the same is within the police powers of the City, second, whether the ordinance, as drafted, will be so construed as to prohibit a party from engaging a room in a hotel or even the back room of a saloon for the purpose of holding a dinner or a dance.

In regard to the first question, we have no hesitancy in saying that the ordinance is strictly within the powers of the city. The first section, which prohibits the appearance of entertainers in tights or the performance of acts by such entertainers while mingling with the audience, is a provision clearly intended for the preservation of morals, and is, therefore, beyond question.

The second section prohibits dancing by patrons of a restaurant or public place of refreshment while the same is open to the public. We are convinced that this provision can be maintained from two different points of view. First, from the standpoint of safety, on the ground that while the restaurant is open to the public there will necessarily be such a shifting of tables and chairs that it will not entirely partake of the nature of a restaurant but will be more like a dance hall, and, therefore, subject to the requirements and limitations of a dance hall. Second, it can also be defended from the standpoint of morals, on the ground that places of this kind, where the public generally indulge in dancing, would naturally tend to greater immorality than the so-called public dance halls, which are at least subject to rigid regulation. In the case of restaurants all bars are thrown down, and what is under control in a public dance hall is beyond the reach of regulation in a restaurant.

We believe that the courts will take notice of such con-

ditions upon the presentation of a proper case, and will uphold the ordinance on that ground.

As to the other point you inquire about, we believe that a reasonable construction of the proposed ordinance as it is now drafted, precludes the idea of a private party in a hotel or any other place being interfered with, because the room where such dancing takes place under such circumstances is not open to the general public. In case the General Superintendent of Police inquires of this department as to the meaning of section 2, we would so advise him.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
Acting Corporation Counsel.

AUGUST 4, 1913.

HON. GEORGE B. YOUNG, M. D., Commissioner of Health:

Dear Sir:

In reply to your communication requesting opinion as to whether it is possible for the city to prohibit the use of the word "hospital" on a sign at a place you find to have only the usual equipment of a doctor's office, we submit that we do not find any ordinance of law prohibiting the use of the word "hospital".

We are of the opinion that the city charter gives the city council ample power to pass an ordinance fixing a penalty for advertising or using the word "hospital" in connection with any place, unless such place is a hospital as defined in section 1213 of the Chicago Code of 1911.

We find that there is a prohibition and penalty provided for advertising any place under the name "dispensary" unless such place is a dispensary as defined in the ordinance. (See sections 1205 and 1212 of the Chicago Code of 1911.)

We are, therefore, of the opinion that there is at the present time no way for the city to prevent the use of the word "hospital" in the case you mention; but the city council,

by amendment or new ordinance, may provide a penalty for such use of the word.

Very truly yours,

WILLIAM J. NAUGHTON,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

AUGUST 4, 1913.

HON. L. E. GOSSELIN, Deputy Comptroller.

Dear Sir:

Your letter in re garnishment demand from the American Adjustment Company against Jesse Northrup has been referred to me for reply.

Municipal corporations are not subject to garnishment proceedings under the statute, and in so holding the courts take the position that to subject municipalities to this statutory proceeding is against the public policy of the state.

Merwin v. City of Chicago, 45 Ill. 133.

Triebel v. Colburn, 64 Ill. 376.

Smith v. Woolsey, 22 Ill. App. 185.

Fast v. Wolf, 38 Ill. App. 57.

An Act approved May 11, 1905 subjecting the salaries and wages of employes of cities to garnishment has been held void as unconstitutional.

Badenoch v. City of Chicago, 222 Ill. 71.

We are, therefore, of the opinion that you are not required to withhold moneys due Jesse Northrup from the city on account of the garnishment demand served upon you.

Yours respectfully,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

AUGUST 7, 1913.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

Your letter of July 18th, 1913, accompanied by copy of a letter sent to your department under date of July 16, 1913, from the American Laundry Machinery Company, also your letter of July 29, 1913, submitting a letter under date of July 26, 1913, from the American Laundry Machinery Company, have been handed me for reply.

From the contents of these letters and information we have on hand, it appears that the directors of the Municipal Tuberculosis Sanitarium, in the course of the construction of the sanitarium advertised for bids for laundry machinery; That bids were submitted on June 12, 1912, as follows:

Troy Laundry Machinery Company	\$9,945.00
American Laundry Machinery Company	8,990.00

After receipt of such bids the Board of Directors of the Municipal Tuberculosis Sanitarium for reasons which are apparent as shown by their proceedings the said directors rejected all bids and asked for new proposals.

The second bids submitted July 15, 1912, are as follows:

Troy Laundry Machinery Company	\$10,280.00
American Laundry Machinery Company	9,285.00

No action was taken on the second bids, but the board found it necessary to investigate further before the acceptance of the same. After demonstration, arguments and extensive inquiry concerning the relative benefits of the two machines, the Board of Directors again deferred action. In the proceedings appears the following report:

"We are of the opinion that the machinery as submitted in the proposition of the Troy Laundry Machinery Company is most substantial in workmanship, superior in quality and that it will not only protect our linen against the wear and tear of the laundry machinery itself than that of the American Laundry Machinery Company, but that it also contains more absolute reliable safety devices and shows greater facility in making repairs as has been attested to by various users of this machinery in Chicago and elsewhere."

On November the 19th, 1912, at a meeting of the board

it was again decided to reject all bids and to ask for third bids. These new bids, being the third and last bids, were submitted to the board and show figures as follows:

American Laundry Machinery Company\$9,097.00

Troy Laundry Machinery Company

Proposal No. 1, with 38x100" Trojan Ironer 9,400.00

Proposal No. 2 with Troy "Big Four"

Ironer, Chest Type 9,250.00

The Board of Directors then proceeded to another investigation on relative fitness of the machinery of the two competitive bidders and the entire matter was referred to Dr. Young, who submitted to the committee a recommendation that the bid of the Troy Laundry Machinery Company with the Chest Type Ironer for \$9,250.00 should be accepted and the board acting on the recommendation of Dr. Young recommended that the contract for laundry machinery be awarded to the said Troy Laundry Machinery Company.

The report of Dr. Young shows that the safety devices of the Troy machines are much superior than those supplied by the American Company, and that "the city would be liable for ten (10) times more than the amount of the difference, the first time a careless employe was injured by reason of the extractor being started before it was closed."

It is contended by the American Laundry Machinery Company that it is compulsory on the part of the Board of Directors to award them the contract on the ground that they were the *lowest responsible bidder*. This department has heretofore held in an opinion of February 21, 1913, that contracts for the Municipal Tuberculosis Sanitarium must be advertised and bids submitted and awards made the same as are required of contracts awarded by the City of Chicago, i. e., to the lowest responsible bidder.

Having advertised in accordance with the ordinance of the City of Chicago the only question here involved is:

Did the directors of said sanitarium act legally in awarding the contract to the Troy Company as against the American Company; the former being the higher of the two bidders?

McQuillin on Mun. Corp., section 1228 treating on question of lowest responsible bidder, says:

“Generally the provision is that the contract shall be awarded to the ‘lowest responsible’ bidder, and this means the lowest responsible one who complies with all the requirements of the statute and the specifications. While it has been adjudged that it also means the lowest one who is pecuniarily responsible, it is generally held to mean not merely the lowest bidder, whose pecuniary ability to perform the contract is deemed the best, but the bidder who is most likely, in regards to skill, ability and integrity, to do faithful, conscientious work, and promptly fulfill the contract according to its letter and spirit. So, too, if the material required is such that the bidder has no right to its use on account of its being patented, his bid may be rejected under a requirement to let the contract to the ‘lowest responsible’ bidder.”

Our Supreme Court in *Hallett v. City of Elgin*, 254 Ill. at 346 and 347 says:

“It is also held that the statutory requirement that contracts for public improvements shall be let to the lowest responsible bidder does not require the letting of a contract to the lowest bidder upon the ascertainment of his financial responsibility only, but the term ‘responsible’, includes the ability to respond by the discharge of the contractor’s obligations in accordance with what may be expected or demanded under the term of the contract
* * *”

In awarding contracts to the lowest responsible bidder the board’s decision “partakes of a judicial character requiring the exercise of discretion and judgment.” (See *Dillon on Mun. Corp.* section 811.) In this regard we may state the law to be:

“In determining, however, who is the lowest responsible bidder, the proper municipal authorities have a wide discretion which will not be controlled by the courts except for arbitrary exercise, collusion, or fraud, and they need not be guided in this determination solely by the question of the pecuniary responsibility of a bidder, but may consider his ability to respond to the requirements of the contract, and his general qualifications to properly execute the work; * * *”

28 Cyc. pages 1031-2 and cases cited.

People v. Kent, 160 Ill. 655.

If the merchandise of said lowest bidder is generally in-

ferior, (as were the facts in *People v. Kent, supra.*) the said board may exercise a reasonable discretion in awarding the contract. In the absence of fraud, collusion, etc., the courts are not inclined to interfere in such awards.

It is, therefore, our opinion that the board acted in accordance with its legal powers in awarding the contract to the said Troy Laundry Machinery Company.

Yours very truly,

LOUIS SALINGER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

AUGUST, 8, 1913.

HON. CARTER H. HARRISON, Mayor:

Dear Sir:

On July 31, you transmitted to this office a communication from Hon. John McWeeny to yourself which stated that Section 2597, of the Chicago Code of 1911, governing the posting of rates of fare cards in public automobiles, did not apply to automobiles called or hired from garages. You ask whether or not this section should be amended.

I desire to first call your attention to the fact that garage owners who rent machines have not been required to post rates of fare cards and have considered it an advantage to their customers not to do so, for the reason that such automobiles are not distinguishable from private cars.

In examining the ordinances pertaining to this subject, I find the following situation:

First: Section 2613, of the Code, which established the maximum rates of fare to be charged by the owners of any automobiles operated for the conveyance of passengers for hire within the city has been amended so that the regulation of rates therein applies only to automobiles which stand, or are kept, upon the streets in the city for employment and that the rates of fare established "shall apply only in cases where the passenger, at the time of the hiring of any vehicle referred to in this section, *expressly elects* to pay therefore at the rate

herein provided." This means that no regulation exists in cases where a passenger does not by an affirmative act elect to hire an automobile at the established rates, and that since the passage of this amendment, June 9, 1911. (C. P. pp. 532-3) there has been no regulation of rates of fare of automobiles called or hired directly from garages. Hence, you will observe, what appeared to be an omission was really designedly cut out.

Second. Section 2693 of the Code, provides a penalty for refusal to pay rental for any automobile called from a garage "in accordance with the rates established by this article." Section 2693 is in article VIII of Chapt. LXXXIX, and no rates of fare for such automobiles are established in said article nor in any other article since the amendment to section 2613 above referred to. Consequently that provision for a penalty is meaningless.

It will, therefore, be of no avail to amend Section 2597 of the Code, which requires the posting of rates of fare cards in automobiles which stand, or are kept, upon the streets for hire, to include automobiles called or hired from garages until maximum rates of fare are established for the hiring of such vehicles.

Respectfully submitted,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

AUGUST 8, 1913.

HON. CARTER H. HARRISON, Mayor:

Dear Sir:

Your communication requesting the preparation of an amendment to the Code to provide for a fixed day for the expiration of plumbers' licenses, together with a communication from the Commissioner of Health, has just been referred to me for reply.

An Act "to provide for the licensing of plumbers and to supervise and inspect plumbing," approved June 10, 1897

(Hurd's Revised Statutes, 1912, page 403), is in part as follows:

"§2. Any person desiring to engage in or work at the business of plumbing, either as a master plumber or employing plumber, or as a journeyman plumber, shall make application to a board of examiners hereinafter provided for, and shall, at such time and place as said board may designate, be compelled to pass such examination as to his qualifications, as said board may direct; said examination may be made in whole or in part, or (in) writing, and shall be of a practical and elementary character but sufficiently strict, to test the qualifications of the applicant."

"§4. Meeting of Board of Examiners—scope of examination—certificate of qualification—fee for.) Said board of examiners shall, as soon as may be, after the appointment, meet and shall then designate the times and places for the examination of all applicants desiring to engage in or work at the business of plumbing, within their respective jurisdiction. Said board shall examine said applicants as to their practical knowledge of plumbing, house drainage and plumbing ventilation, and if satisfied of the competency of such applicants shall thereupon issue a certificate to such applicant authorizing him to engage in or work at the business of plumbing whether as master plumber, or employing plumber or as a journeyman plumber.

The fee for a certificate for a master plumber or employing plumber shall be \$50.00; for journeyman plumber it shall be \$1.00. Said certificate shall be valid and have force throughout the State for a period of one year from date of issuance and may be renewed upon its expiration by payment in advance of an annual renewal upon its expiration by payment in advance of an annual renewal fee of \$10.00 for the certificate of a master plumber or employing plumber and the payment in advance of an annual renewal fee of \$1.00 for the certificate of a journeyman plumber. All fees received for said certificate shall be paid into the treasury of the city, town or village where said certificates are issued. (As amended by act approved June 14, 1909. In force July 1, 1909, L. 1909, p. 132.)

In the case of *Wilkie v. City of Chicago*, 188 Ill. 444, our Supreme Court held that whatever power the city had to regulate the occupation of plumbing prior to the passage of

the above Act must necessarily be limited by the express provisions of that Act and declared an ordinance requiring additional license fees invalid.

In *Douglas v. The People*, 225 Ill. 536, the above act was held constitutional.

Our present ordinance establishing a Board of Examiners of Plumbers and regulating the licensing of same follows the provisions of this Act, but were it to contain provisions inconsistent with the provisions of this Act it would undoubtedly be void.

The Board of Examiners of Plumbers may designate such times and places as they choose for the holding of examinations. This Board, under the law, consists of the Commissioner of Health and two other members appointed by the Mayor and approved by the City Council. If it is the desire of the Commissioner of Health to hold examinations at stated intervals and issue licenses accordingly the proper place to take the matter up would be with the Board of Examiners which has ample power under the law as above set forth to control this. The City Council is limited in its powers so that it cannot do so.

Under section 1766 of the Chicago Code of 1911 and sections 2 and 4 of the above Act, the Board of Examiners of Plumbers, after examination of applicant for a license if satisfied of his competency "shall *thereupon* issue a certificate to such applicant, which certificate shall be valid and have force throughout the State for a period of *one year from date of issuance* and may be renewed upon its expiration by payment in advance of an annual renewal fee. * * *"

We are of the opinion, in view of the express provision of the statute in regard to the issuance of licenses, that any ordinance attempting to establish a definite date for the issuance or expiration of plumbers' licenses would be invalid. Neither has the City Council power to designate the time of holding examinations or of issuing such licenses as the statute gives this power to the Board, but the object sought by the Commissioner of Health may readily be accomplished by the Board of Examiners of which he is the head. They may regulate the time of holding examinations so that licenses may be

issued in the future at certain periods of the year or at a specified time annually. A greater difficulty presents itself in regard to the renewal certificates, which under the statute are supposed to be issued just one year after the original certificate is secured. Under a strict construction of the statute, therefore, the renewal certificates, of those plumbers who at present hold licenses, would have to be issued at intermediate dates, but we do not believe that the Board of Examiners is bound to such a strict construction of the time of issuance of renewal certificates that it cannot extend the licenses up to the beginning of a new license period, if it finds it advisable to establish same, in conformity with a new date of examination.

Respectfully submitted,

LORING R. HOOVER,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN.

Acting Corporation Counsel.

AUGUST 8, 1913.

HON. E. C. SHANKLAND, Chairman, Harbor and Subway Commission:

Dear Sir:

On August 7, 1912, the chairman of your commission forwarded a letter to this department asking for answers to certain questions therein contained. This letter was answered on September 18, 1912, but in view of the fact that a new harbor act went into effect on July 1st, 1913, you request that these same questions be again answered by this department.

Complying with your request which bears date of August 6, 1913, I submit the following:

Your first question is

“What is the status of the proprietary rights to lands between the Government meander lines and the present shore lines of the lake?”

The Government meander line ordinarily is not a boundary line, and a shore owner's title under the decisions of our Supreme Court extends only to the water's edge. The title to

the submerged lands, or the bed of the lake, is held by the State of Illinois in trust for the people, and, under the provisions of the harbor act the city is given authority "to use, occupy or reclaim all such submerged lands under the public waters of the State within the limits or jurisdiction of, or bordering on, such city or village, as may be necessary or appropriate for any of the purposes" in the act enumerated.

Question 2.

"If it is desirable to establish harbor lines beyond which encroachments may be made without injury to any harbor scheme that may be evolved by what authority can such harbor lines be established?"

Section 16 of the harbor act of July 1st, 1913, provides:

"Every city and village in this State shall have the right, power and authority, and the right, power and authority are hereby granted, to locate and establish dock lines and harbor lines in the public waters or rivers within the limits or jurisdiction of, or bordering on such city or village."

Question 3.

"Does the City of Chicago obtain title to land or any part thereof made by filling between the shore line and any established harbor lines?"

As above set forth, a city is authorized to use, occupy or reclaim all such submerged lands as may be necessary for harbor development, and section 12 of the harbor act of July 1st, 1913, provides as follows:

"Sec. 12. Every such city and village may also acquire the lands, whether of natural or artificial formation, property and property rights, including riparian rights, of any owner or claimant, whether a person or corporation, private, public or municipal (other than a city or village), on the shores of public waters in, upon or near which it is proposed to construct any harbor or utility authorized by this Act, and also the title of any such owner or claimant, to the lands lying beneath, adjacent to or adjoining such public waters, without other compensation, by agreeing with any such owner or claimant, upon a boundary line dividing the lands (whether of natural or artificial formation), to be acquired by such city or village and the adjacent, adjoining or submerged or other lands (whether of natural or artificial formation) to be taken and acquired by such owner or claimant. The rights and property to be taken and acquired, respectively, by any

such city or village and by any such owner or claimant, shall be specifically described and set forth in the decree to be entered by the court as in this Act provided.

Section 13 provides in part as follows:

“The establishment of such boundary line as aforesaid shall operate as a conveyance and release to such city or village of all the right, title and interest of such owner or owners to any and all lands, property and property rights, including riparian rights, lying upon the outer or water side of said boundary line when so established. Such city or village is hereby granted by the State of Illinois the title to any and all lands, property and property rights including riparian rights, lying upon the outer or water side of said boundary line when so established. Such owner or owners of said shore lands are hereby granted by the State of Illinois the title to the adjacent, adjoining or submerged or other lands, whether of natural or artificial formation, as specifically and particularly described in said decree, lying upon the inner or land side of said boundary line when so established, and such owner or owners shall have the right to fill in, improve, protect and use, sell and convey said submerged or other lands lying upon the inner or land side of said boundary line free from any adverse claim in any way arising out of any question as to where the shore line was at any time in the past, or as to the title to any existing assertions.”

Question 4.

“Whenever riparian rights are involved, and if question 3 is answered in the affirmative, can the city exchange any such made land for the riparian or littoral rights, as has been done by the Lincoln Park Commissioners along the shore of Lake Michigan?”

Section 12 above quoted in the answer to question 3 answers question 4 in the affirmative.

Question 5.

“Can the City of Chicago issue permits for the deepening of Lake Calumet by dredging?”

Under authority of the harbor act and the ordinance which created Harbor District No. 4, passed November 20, 1911, and under authority of other existing ordinances, the city has the right to issue such permits.

Question 6.

“Can the City of Chicago issue permits for the depositing of said dredged material in the lake along the shore?”

The answer to this question is that such permits can only be issued after the riparian rights of shore owners have been acquired.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

AUGUST 11, 1913.

HON. RAY PALMER, City Electrician:

Dear Sir:

Your request of the 8th inst. for advice as to the liability of the Illinois Central, Chicago Rock Island & Pacific, Lake Shore & Michigan Southern, Chicago & Western Indiana and Pittsburgh, Ft. Wayne & Chicago Railroad Companies to light subways on 51st street between Wallace street and Shields avenue, is at hand.

The track elevation ordinances of the Illinois Central and Pittsburgh, Ft. Wayne & Chicago Railroad Companies do not provide for the lighting of subways. Therefore, under the decision of our Supreme Court these companies cannot be charged for lighting subways.

Chicago & Western Indiana Railroad Company is required by Section 12 of a track elevation ordinance passed October 23, 1899, “to light the subways hereinbefore authorized to be constructed in the manner prescribed by ordinances now in force for the lighting of the portion of their tracks at said crossings”. This ordinance covers the subway at 51st street.

The Chicago Rock Island & Pacific and the Lake Shore & Michigan Southern Railway Companies are required by track elevation ordinance passed June 9, 1894, “to light the subways hereinbefore authorized to be constructed in the manner prescribed by ordinances now in force for the lighting by

the railway companies of the portions of their tracks at said crossings''. This ordinance provides for the subway at 51st street.

The ordinances in force, above referred to, provide as follows:

"1763. Elevated railroads—street intersections—light.) All railroad companies whose track or tracks cross or intersect any of the streets within the limits of the city of Chicago above the level of such streets shall, and they are hereby required to provide, at their own expense, proper and sufficient lights and care for the same at all such crossings or intersections underneath the track or tracks of said railroad companies. Said lights shall be subject to the approval of the commissioner of public works."

Chicago, Rock Island & Pacific, Lake Shore & Michigan Southern and Chicago & Western Indiana Railroad Companies are therefore required to light their subways crossing 51st street.

Very truly yours,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

AUGUST 14, 1913.

HON. JOHN MCWEENY, General Superintendent of Police.

Dear Sir:

Your communication of August 1st, 1913, has been assigned to me for reply. The question asked is as to whether or not van movers, etc., charging by the hour, may charge for the time consumed in arriving at the point where the merchandise is loaded and also the time consumed after delivery in returning to their place of business.

First: The tariff of rates is regulated entirely by section 2624 of the Chicago Code of 1911 which is as follows:

"Tariff of Rates.) The rates to be charged for the use of any public cart licensed under the provisions of this article and for the loading and unloading of the same shall not exceed the following:

1. For trunks, baggage, goods, wares and merchandise (other than household furniture and pianos); for each article not exceeding three hundred and fifty pounds in weight, for the first two miles or fractional part thereof, fifty cents; for each additional mile, twenty-five cents.

2. For household furniture (other than pianos); for the use of a one-horse vehicle, (including the driver thereof) one dollar and twenty-five cents per hour; for the use of a two or three-horse vehicle (including the driver thereof), one dollar and fifty cents per hour; for the services of each additional man, fifty cents per hour.

3. For pianos; where the distance to be traveled is three miles or less, three dollars; for each additional mile or part thereof, fifty cents; for transporting pianos either up or down one or more flights of stairs, fifty cents for each flight; for the use of a hoist, five dollars."

The first paragraph of the above section is general and applies to each of the three subdivisions of said section regulating the different classes of employment. When the employment is under clauses numbered one or three the charges are regulated solely by the number of miles traveled, and begins at the point of loading and ends at the time of the unloading, and this is the point where the first paragraph of the section is read into and interpreted as part of said clauses numbered one and three in said section, and by rule of interpretation it necessarily follows, that the first paragraph is also a part of clause two where the employment is by the hour and the intention of the section is plainly that the employment when by the hour commences at the time of the loading and ends at the time of the unloading.

Second: The intention of the City Council was plainly to set out all the charges that could be lawfully made for the transportation of such merchandise, and if the intention was that charges could be made for time consumed before the loading and after the unloading it would have been recited without doubt in the ordinance, therefore we are of the opinion that under said section no charges can legally be made for time utilized by the expressmen, etc., in arriving at the place of

loading; nor for time necessarily used in returning from the place of unloading.

Yours respectfully,

W. M. CAGNEY,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

AUGUST 15th, 1913.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO:

Gentlemen:

On July 28th, 1913, when the purchase of lands for harbor purposes in the Chicago Dock and Canal Company's Peshigo Dock addition was under consideration, Elizabeth Schmiedt and Hermann Krueding served notice upon the Mayor of Chicago and your honorable body that they claimed to have some right, title, interest, claim and demand in and to certain lands described in said notice, and upon the same date your honorable body requested an opinion of the Corporation Counsel relative to the claim of said Elizabeth Schmiedt and Hermann Krueding.

Complying with your request for an opinion, I beg to submit the following:

The lands in question are described as follows:

"All that piece or parcel of land commencing at a point four hundred and fifty-one and 42/100 (451.42) feet east of the point where the north line of Erie street intersects with the east line of St. Clair street, in the City of Chicago, thence south to a point four hundred and fifty-one and 42/100 (451.42) feet east of the point where the north line of Illinois street, in said City, intersects the east line of St. Clair street aforesaid, thence east one hundred and sixty (160) rods, thence north to a point one hundred and sixty (160) rods east of the point of commencement and thence west to said point of commencement, containing one hundred and sixty (160) acres, more or less."

These lands do not include the extension of Illinois street nor the south 222 feet of the east 100 feet of lot 7 in Peshtigo

Dock addition which form a part of the City's purchase. The lands described in the notice of Elizabeth Schmiedt and Herman Kruegel include a considerable area of submerged lands covered by the waters of Lake Michigan to the north of said lot 7, the title to which is in the City of Chicago by virtue of the recent Harbor Act passed by the State Legislature and the Harbor Ordinance passed by your honorable body on July 28th, 1913.

I have examined an abstract of title to the lands described in said notice, which abstract was furnished me by the Chicago Dock and Canal Company. Said abstract, it is certified, shows all conveyances and instruments affecting title of persons claiming by, through or under title derived from Robert A. Kinzie, to whom the United States issued a patent March 9th, 1837, for the lot of nor fraction of Section 10, in Township 39 North, Range 14, east of the Third Principal Meridian in Cook County, Illinois. I find no conveyances in said abstract to Elizabeth Schmiedt or Herman Kruegel in the Kinzie chain of title. I have, however, seen what was claimed to be an abstract made by one Edmund Bailey, which had been submitted by said Elizabeth Schmiedt and Herman Kruegel to the Chicago Dock and Canal Company as an abstract of title to the premises claimed by them. This purported abstract shows bounty land warrant No. 88,684 issued to Rhislem Hissey and Phelby I. Major, minor children of James Hissey, deceased, private, Captain Watter's Company, Maryland Militia, War of 1812. It is stated that the holder is entitled to locate 160 acres of land at any land office in the United States in one body, in conformity to legal subdivisions of the public lands, subject to sale at either the minimum or lower graduated prices. This bounty land warrant, through various assignments, as appears from said purported abstract, became the property of Peter T. Johnson, who in 1894 undertook to locate the same on what he described as the unsurveyed public lands lying immediately east of and adjoining the north half of fractional Section 10, Township 39 North, Range 14, East of the Third Principal Meridian. This is one of the bounty land warrants upon which many of the Street claims are based. Peter T. Johnson purports to convey by quit-claim

deed dated January 11th, 1894, to George W. Streeter, a portion of the lands upon which he sought to locate bounty land warrant No. 88,684. This latter deed is contained in another so-called Streeter abstract, a copy of which was furnished to me sometime ago.

While the Schmiedt and Krueding abstract does not show a connected chain of title, it seems that their claim includes the entire amount embraced in the Johnson land warrant location, that the portion of the harbor purchase involved is in the southern portion of the Johnson tract, and the lands conveyed by the quit-claim deed of January 11th, 1894, to Streeter in the northern portion of the Johnson tract.

I have made inquiry at the office of the Chicago Title and Trust Company, and have gone over with one of their officers their tract book of irregular conveyances in fractional section 10, and find of record among said irregular conveyances one quit-claim deed by Barbara Schneider to Elizabeth Schmiedt dated August 13, 1898, and one special warranty deed by Clara H. Sturtevant and husband to Elizabeth Schmiedt dated May 6th, 1898. I also find an agreement between Elizabeth Schmiedt and husband, first party, and Herman Krueding, second party. During said inquiry I was informed that the Chicago Title and Trust Company disregards these conveyances and guarantees title over them in the district north of the Chicago river, and in which Peter T. Johnson and George W. Streeter have operated.

I further desire to direct your attention to a printed pamphlet of forty-seven pages entitled "The Shore of Lake Michigan," by Edward Osgood Brown, now a member of the Appellate Court in this district, and who, as the attorney for the Commissioners of Lincoln Park, represented the same at Washington, D. C., in connection with the controversy in which certain persons undertook to make locations of certain bounty land warrants known as the McKee Scrip. This was a paper read before the Law Club of the City of Chicago April 25th, 1902. From page twenty-eight of said pamphlet I quote Judge Brown as follows:

"The McKee Scrip application was heard during the following month by the new Commissioner of the General

Land Office, and upon May 26, 1897, an opinion was filed by him holding that there were no public lands of the United States in section 10, in township 39, etc. The survey and approval of the plat were set aside and the application to enter the scrip denied and its return to the applicants ordered.

"An appeal was taken from this decision to the Secretary of the Interior and argued, chiefly upon the ground that after Mr. Lamoreaux's decision, approving the plat, the question was foreclosed in the department. The Secretary of the Interior, however, affirmed the opinion of the Land Commissioner, and the McKee Scrip case was at an end, although when I ceased to represent the Lincoln Park Commissioners, there was pending, and may be yet, in the Circuit Court of the United States, a partition suit, brought by one of the applicants, in which the assertion was made that owing to the approval of the aforesaid described plat and survey, and the action of the applicants in locating the strip, a title vested in the applicants, which it was impossible for any subsequent action of the interior department or even of the courts to annul.

"No attempt has been made to press this cause, and it may have died before now a purely natural death. It is not too much to say that its evident purpose was only to keep alive, so far as possible, a cloud on the title."

I am, therefore, of the opinion that the claim of title of Elizabeth Schmiedt and Herman Krueding is without foundation, and that the same cannot be successfully maintained in the courts, either State or Federal.

I return herewith notice of Elizabeth Schmiedt and Hermann Krueding bearing date of July 28, 1913.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

AUGUST 16, 1913.

HON. JOHN MCWEENY, General Superintendent of Police:

Dear Sir:

You request an opinion as to whether the police department of the City of Chicago can require songs, before they are published, to be submitted to it for censorship.

A chronological summary of efforts under the common law to enact censorship may be best summarized by advising you that in England the government upon the "introduction of the art of printing soon looked upon the same as merely a matter of state, and subject to the coercion of the Crown."

IV. Blackstone, 152.

They, therefore, proceeded to regulate the same, by censorship, proclamations, etc., but the effort to curtail the power of the press was finally lost to the government, although the government tried to revive the same, parliament resisted those attempts and the press became properly free in 1694. The result being that finally the doctrine of the liberty of the press became a firm and fixed one.

Speaking of the English sentiment with regard to the inviolability of the press, Lord Ellenborough in summing up to the jury in the Cobbetts case, 29 How. St. Tr. 49, said:

"That the law of England is a law of liberty and consistently with this liberty we have not what is called an *imprimatur*. There is no such preliminary license necessary. But if a man publish a paper he is exposed to the penal consequences if it be illegal."

The framers of our Constitution, evidently fearing a revival of the old theory, demonstrated their dislike to the censorship, and as an animadversion thereof placed in the Constitution inhibitions against legislatures curtailing the liberty of the press.

Section 4 of Article II of the Constitution of the State of Illinois provides as follows:

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty;"

This section of the Constitution is incorporated in what is known as the Bill of Rights and is substantially the same and in furtherance of provisions as embodied in Article I to the Amendments of the Constitution of the United States which is:

"Congress shall make no law * * * abridging the freedom of speech or of the press."

Cooley, Const. Lim. 7th ed. 604, says:

"The Constitutional liberty of speech and press as we

understand it implies a right to freely utter and publish whatever the citizens may please except so far as such publication from their obscenity or scandalous character may be a public offense or by their falsehood or malice they may injuriously effect the standing, reputation or pecuniary interests of individuals."

In its broadest sense the freedom of the press includes not only exemption from censorship, but security against the law enacted by the legislative department of the government or measures resorted to by either of the other branches for the purpose of stifling just criticisms or muzzling public opinion.

Black Const. Law, p. 472-73.

Cooley, Const. Lim. 5, 17-18.

Odoroux Const. Legis. p. 236, *et seq.*

3 Story Const. p. 731.

Our courts have frequently been called upon to prevent a prospective publication, in advance, of literature but these efforts have generally met with failure.

Marx & Haas Jeans Clothing Company v. Watson, 168 Mo. 133.

Lindsay v. Montana Fed. of Labor, 37 Mont. 277.

In the case of the *Marx & Jeans Clothing Company v. Watson*, where an effort was made to restrain a publication of an unfair circular by a labor union, the Supreme Court of Missouri, in speaking of a similar clause of the constitution of the State of Missouri, at page 146 says:

"The probable reason why the rights of free speech, free writing and free publication were mentioned in terms in our organic law is that in the mother country, from whence our institutions were derived, there was scant regard paid to those rights in that country, and a censorship existed over the press, and publication without permission was punished as criminal, and various annoying restrictions over free speech existed; and men were punished by imprisonment for offensive words spoken in debate, even in Parliament."

The court further says at page 147:

"The right of the citizen to freely speak, write, and publish his sentiments is unlimited; but he is responsible at the hands of the law for an abuse of that right. He

shall have no censor over him to whom he must apply for permission to speak, write, or publish; but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the Constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose." Cited in 6 Am. & Eng. Enc. Law, 2d ed. 1003." See in re Dailey, 112 Calif., 96.

Lindsay v. Mont. Fed. of Labor, 37 Mont. 277.

As a general rule of law the right of censorship to publications is prohibited by the spirit of the Constitution of the United States, (Freund on Police Power, Sec. 471) and in violation of the provisions of our State Constitution.

It may be contended, however, that the censorship of publication of songs is extraneous from the provisions of the Constitution because the publication of certain songs are a nuisance, being lecherous and derogatory to public good, and, therefore, amenable to the regulation under the police power of the State.

Bearing in mind the fact that the police powers of the State must be exercised in subordination of the Constitution, (*Smith v. Lake Shore & M. S. Ry. Co.*, 114 Mich. 460, *Lake Shore & M. S. Ry. v. Smith*, 173 U. S. 684), we may regulate the sale and distribution of songs only in so far as powers delegated to the municipality are not in conflict thereof.

These powers to regulate must be found in either one of the three following provisions of the Cities and Villages Act. Article V of said Act gives powers to the City Council as follows:

41. To license, tax, regulate, suppress and prohibit
* * * theatricals and other exhibitions, shows, and amusements, and to revoke such license at pleasure.

6. To regulate the police of the City or Village, and pass and enforce all necessary police ordinances.

75. To declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist.

If it is decided to regulate the publication of songs, the

powers to regulate must be found in either one of the above delegated provisions, i. e., 41-66-75.

If it is decided on the part of the police to prohibit the performance of obscene songs in theaters and places of amusement and to regulate the production thereof, the courts will perhaps, under provision 41, *supra*, follow the principles as laid down in the case of *Block v. City of Chicago*, 239 Ill. 251, and will give the right of censorship to the police department upon proper ordinance of the council to prohibit the production of improper songs in places of amusement. Council also has the power under section 66 to forbid indecent books and pictures and to regulate the display, sale or distribution of immoral literature.

8 Cyc. 870.

Cooley's Const. Lim. 7th ed. 884.

Obscene songs are not protected by the Constitutional guaranty of freedom of speech or press.

U. S. Harmon, 45 Fed. Rep. 414.

Harmon v. U. S., 50 Fed. Rep. 921.

U. S. v. Bennett, 16 Blatch. 338.

Under section 75 of the said Act they may declare what shall be a nuisance and abate the same. Therefore, the City Council under said provisions has a right to declare what class of objectionable literature shall be regarded as a nuisance and prohibit the circulation thereof .

Roberts v. Ogle, 30 Ill. 459.

Village of Desplaines v. Poyer, 123 Ill. 348.

Laugel v. City of Bushnell, 197 Ill. 20.

Therefore, it is our opinion that should the council desire to suppress certain songs that appear to be repugnant to the good morals of the community, they may, by proper ordinance make provisions for their suppression but they have no legal right to compel *all* songs irrespective as to where cir-

culated to be first submitted to the department for censorship before publication.

Yours very truly,

LOUIS SALINGER,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

AUGUST, 19, 1913.

HON. JOHN E. TRAEGER, City Comptroller:

Dear Sir:

Your communication of the 6th inst., reporting that your conference with Mr. S. W. Tracy, vice-president of the Chicago Tunnel Co. and the Chicago Warehouse & Terminal Co., has been unavailing in effecting a settlement of an accounting with the city of the gross receipts of the Chicago Tunnel Co., has been referred to me for consideration.

The Chicago Tunnel Co., is successor, through purchase of the property and franchise of the Illinois Tunnel Co. and is owner of the franchise granted to the Illinois Telephone & Telegraph Co. on Feb. 20, 1899, with amendments thereto of July 15, 1903 (C. P. pp. 914-921), July 20, 1903 (C. P. pp. 928-929), Feb. 1, 1909 (C. P. pp. 2602-2604), and June 28, 1909 (C. P. pp. 911-914), which amendments were made in the name of the Illinois Tunnel Co. On June 25, 1913, an agreement was made between the Chicago Tunnel Co. and the Chicago Warehouse and Terminal Co. which purports—

First: To cover a period from May 3, 1912, to Feb. 19, 1929, "unless sooner terminated or modified by mutual agreement."

Second: To transfer to the Terminal Company, the Tunnel Company's power to solicit and negotiate for business.

Third: The Tunnel Company to accept as compensation from the Terminal Company for business so procured, 50¢ per ton on all merchandise not specifically provided for; and as to that specifically provided for, such amount as the Terminal Company may charge subject to the approval of the

Tunnel Company less a specific amount to be deducted by said Terminal Company.

Fourth: The Terminal Company to collect all charges and account therefore monthly to the Tunnel Company.

Aside from any question arising, by reason of the probable single ownership of these two companies, the gross receipts obtained by said Tunnel Company from the above referred to agreement, cannot be taken as the basis upon which the percentage required to be paid by said company to the city under its franchise, shall be computed.

The amendatory ordinance of July 15, 1903, as amended July 20, 1903, Feb. 1, 1909, and June 28, 1909, is in part as follows:

"Section 3. Whenever required by its business said company shall have the right and permission is hereby granted to it, to connect up any of its tunnels, now or hereafter constructed underneath the streets and alleys of the city, with the lots of private owners abutting on such streets and alleys (consent of the owners or lessees of such lots being first obtained), and also with the branch offices or delivery stations of said company, by proper passageways or connecting tunnels, * * *"

"Section 5. The City Council hereby reserves the right to make from time to time reasonable regulations of all charges and rates made by said company for the service authorized by Section 1 of this ordinance * * *"

"Section 6. The City Council shall have the right * * * to take over the property of the grantee, suitable to and used by it for all the purposes of this grant, including the tunnels themselves, and all *appurtenances, equipment and fixtures* * * *"

"Section 8. The provisions, conditions and restrictions of this ordinance shall be binding upon all assignees, lessees or transferees, successors and assigns of the said Illinois Telephone and Telegraph Company."

"Section 9. As compensation for the privileges conferred by this ordinance for the transmission and transportation of mail, newspapers, packages and merchandise, the said company shall pay into the city treasury annually, on the 15th day of January of each year, percentages of its gross receipts for the proceeding years of the business conducted under authority of this ordinance, as follows: For the first ten years of the grant, five per cent.; for the second ten years of the grant, eight

per cent.; and for the balance of the term of the grant, twelve per cent. * * *"

"Section 11. The said company shall, within two years after the date when this ordinance shall be in force, install and operate in the tunnels herein authorized, so far as the same shall be completed, a system, by car or other proper and appropriate appliance, by which said company shall convey and transport such packages, mail matter, newspapers or merchandise, as may from time to time be offered to it for such conveyance and transportation by any person or persons desiring the same; and said conveyance and transportation of such mail matter, packages, newspapers and merchandise, shall be maintained and continued through said tunnels by said company, its successors and assigns, during the life of this ordinance. * * *"

The very nature of the business authorized by the franchise, under which the Tunnell Company operates, requires the establishment of branch offices and delivery stations; and that this was contemplated by the city and was a part of the franchise, is clearly indicated by that part of Sections 3, 6 and 11, above set out. Section 5 reserves to the city the power to regulate the rates of said company, but by clause "A" of paragraph 3, of the agreement above referred to, the Tunnel Company transfers the establishment of certain rates to the Terminal Company. This it has not the power to do.

Section 9 provides for compensation to be paid to the city by said company in consideration of the franchise granted, which compensation is a percentage of the company's gross receipts for the business conducted under authority of said ordinance.

If this company, at the present time, does not itself own or operate terminals or freight stations, it is bound to either lease or purchase such facilities or construct and operate new ones so that it may properly exercise the functions and perform the obligations and duties required of it by its franchise.

Without branch offices, delivery stations, terminals, and like facilities, this company can more exercise the franchise granted it, nor perform the duties undertaken by it in accept-

ing said franchise, than could an elevated railroad without stations, platforms and stairways or lifts, or a steam railroad without cars, depots and freight houses, or a telephone company without telephones. This company is required to supply these facilities.

In *The York & Maryland Line Railroad Co. v. Winans*, 58 U. S. 30, the court says on page 39:

“The plaintiff complains here of this charge, for that the cars employed were not built by, and did not belong to the company; that they were the exclusive property of the Maryland corporation; and that the agreement to divide the profits did not constitute a partnership, nor evince a relation of principal or agent to impose a liability. This conclusion implies, that the duties imposed upon the plaintiff by the charter, are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature.”

The franchise of the Tunnel Company was granted for the performance of a public duty and intended to be exercised for the public good. And contract which restrains the performance of the duties undertaken or transfers to others without authority the rights and powers conferred by franchise, is void as against public policy.

In *Gibbs v. Baltimore Gas Company*, 130 U. S. 396, Chief Justice FULLER says on pages 410 and 411:

“It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests.

“Where,” says Mr. Justice Miller, delivering the

opinion of the court in *Thomas v. Railroad Co.*, 101 U. S. 71, 83, "a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disabled the corporation from performing those functions, which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State and is void as against public policy."

In *Central Trust Company v. Pullman's Car Company*, 139 U. S., page 24, on page 50 the court says:

"But the purpose of its incorporation, as defined in its charter, and recognized and confirmed by the legislature, being the transportation of passengers, the plaintiff exercised a public employment, and was charged with the duty of accommodating the public in the line of that employment, exactly corresponding to the duty which a railroad corporation or a steamboat company, as a carrier of passengers, owes to the public, independently of possessing any right of eminent domain. The public nature of that duty was not affected by the fact that it was to be performed by means of cars constructed and of patent rights owned by the corporation, and over roads owned by others. The plaintiff was not a strictly private, but a quasi-public corporation; and it must be so treated as regards the validity of any attempt on its part to absolve itself from the performance of those duties to the public, the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise."

Oregon Railway & Navigation Company v. Oregonian Railway, 130 U. S. 1.

Chicago Gaslight Company v. People's Gaslight Company, 121 Ill. 530, on page 542 the court says:

"There may be cases where a corporation may abandon a public work for reasonable cause, but this is a very different thing from disabling itself by contract from the performance of a duty to the public."

It is apparent that this company is perpetrating a fraud upon its creator. It attempts to contract away an essential and dependent part of its function, and by so doing to cheat

the city out of a substantial share of the consideration due the city for the franchise granted it.

The audacity of the plan is manifest by a comparison of the payments made the city for the years ending December 31, 1911, and December 31, 1912, the amount of same being \$42,444.98 in the former year, and \$29,716.28 in the latter year. The fact that the Terminal Company receives the money for the transportation of goods, does not relieve the Tunnel Company from accounting to the city for all the money so received by said Terminal Company, and all money received by said Terminal Company for receiving and handling goods at its terminals for transportation by said Tunnel Company must be included in making up the aggregate gross receipts to be used as a basis in computing the compensation.

I therefore advise you to immediately proceed with the collection of the amounts due the city, same to be computed in accordance with above opinion.

Yours very truly,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

AUGUST 20, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In reply to your verbal inquiry concerning the right of the city to pay for certain real estate, which the recent harbor ordinance authorizes the executive officers of the city to purchase, by turning over harbor bonds as specified in said ordinance, I beg leave to submit the following:

The City Comptroller several days ago made a somewhat similar inquiry in connection with this deal. He asked whether it was proper under the law to turn over bonds without going through the formality of a sale. On this point we answered, without a written opinion, that there could be no question about the right to do so, since the law never requires any one to do a useless thing, and going through the formality

of selling and paying over the proceeds is entirely unnecessary where the price is fixed as the exact amount of such sale. This could be the only interpretation as to the amount to be paid under the ordinance, which authorizes the payment of a fixed amount in bonds at par.

Your own inquiry relates more to the value of such bonds and the methods of fixing such value than it does to the propriety of using them without a sale for the purpose of purchasing the property in question. In other words, you want to know how municipal officers have the right to assume that they are getting the best price possible for the bonds without advertising them for sale, even though it may be a matter of common knowledge that such bonds are selling below par when the deal is consummated.

This question, as well as the one asked by the Comptroller, is governed entirely by statute, the general rule being that when the statute is silent on the subject, the discretion of the municipal officer charged with the responsibility will prevail in the absence of fraud.

If the statutes of the State or the ordinances of the City require that bonds should be sold after advertising, then such requirements would have to be observed to the letter; but there is nothing in either the statutes or ordinances which makes it necessary for the fiscal officers of the city to advertise in order to dispose of bonds; and, therefore, it is within their power to dispose of them to the best advantage possible. The sale of same at par or the use of same in such a manner as to net the city the equivalent of their par value could not under any circumstances be criticised.

The rule is well stated in 28 Cyc., p. 1596, from which we take the following excerpt:

“Authority to borrow money and issue bonds impliedly authorizes the sale of the bonds when issued.
* * * Where it is required that bonds shall be sold after advertisement and to the highest and best bidder, a sale without advertisement, without competition, and not to the highest bidder, is void. Where, however, there is no such requirement a municipality authorized to issue and sell bonds to pay a debt or subscription may, the debtor or beneficiary consenting, deliver the bonds at par in payment of the debt or subscription in lieu of raising

money upon them by loan and then paying that money in discharge of the debt or subscription.”

The above text is supported by an abundance of authority.

Hence, it is quite plain that the City Council had the power to authorize the officers of the city to turn over harbor bonds in payment for property which is to be acquired for them.

Yours respectfully.

LEON HORNSTEIN,
Acting Corporation Counsel.

AUGUST 29, 1913.

MR. HERBERT C. LUST, Otis Building, Chicago, Ill.

Dear Sir:

Your letter of August 4, 1913, addressed to Honorable Carter H. Harrison, Mayor, in regard to the use of the beach lying between Lawrence and Lakeside avenues, has been handed to me for reply.

You state that the abutting owners are trying to make a private beach at this point. If this land is private land and has never been acquired by the city or by the public by any of the means known to the law, then the abutting owners have the right to make of it a private beach and to use it as such. You say that in your letter of July 16, 1913, addressed to the Mayor, you stated “that a strip of land, between the points in question, had been used as an extension of Clarendon Rd. for more than fifteen years.” I have looked up your letter of July 16th in our files, and I find no statement therein in regard to fifteen years’ occupancy by the public. I do, however, find that the matter of fifteen years’ occupancy was referred to by me in an opinion dated March 22, 1913, addressed to John D. Riley, Esq., Examiner of Subdivisions, in reply to a question involving the same strip of ground.

I may say here that the reply to your letter of July 16, 1913, was written by Nicholas Michels, Assistant Corporation Counsel, and not by me.

You further state, in your letter of August 4th, that my opinion by Mr. Riley “does not, however, answer the point at

issue; namely, whether the public have a right to use the beach or the lake lying between those two streets." This question is easily answered. The lands being private lands, the shore owner's title extends to the water's edge, and the public has no right to the use of the beach. As to the lake, it is a public highway and may be used by the public for navigation and for any of the other uses or purposes that apply to public waters.

In my opinion to Mr. Riley I make this statement:

"I am informed that this strip of land has been used from time to time as a driveway or highway, but not consecutively for fifteen years for the reason that it has at various times been washed out."

This you have quoted in your letter of August 4th, and add that you do not know where I got my information but that it is erroneous. Before writing the opinion I caused an investigation to be made by Mr. George Inman, Title Expert of the map department, and after much investigation he furnished me with the information upon which the above quoted statement is based. I have recently conferred with him and he assures me that the strip of ground between Lakeside and Lawrence avenues, commonly referred to as an extension of Clarendon road, has been washed out and filled in a number of times within the last few years; that he has made a number of inspections of this ground within the last four years; that he lives only a few blocks from the land referred to and is familiar with the conditions, and that if required to do so he can produce witnesses to testify to these facts.

Yours truly,
JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 4, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In reply to your communication transmitting letter from Dr. Young concerning the matter of disposal of garbage of hotels, restaurants, etc., I beg leave to submit a review of the

decisions pertaining to this subject with conclusions deduced therefrom.

Garbage matter, if not decayed, noxious and deleterious to health when discarded, is extremely liable to become so because of the character and condition of same, unless properly taken care of, and the courts have therefore regarded garbage as a nuisance *per se* which may be summarily abated. Considering garbage as either an actual or potential nuisance the ordinances regulating the method of removal and disposition of same have generally been sustained.

So municipalities may contract for the erection of a crematory for the destruction of garbage, *Kilvington v. Superior*, 83 Wis. 222, contract for its removal, *Balch v. Utica*, 168 N. Y. 651, require its removal in covered tanks, *People v. Gordon*, 81 Mich. 306, in licensed wagons, *Dupont v. District of Columbia*, 20 App. Dist. of Col. 477, by licensed collectors, *State v. Robb*, 100 Maine 180, *St. Louis v. Weitzel*, 130 Missouri 600, to designated places, *Ex parte Casinello*, 62 Calif. 538.

The courts have differentiated the removal and disposal of garbage from the removal and disposal of dead animals and manure for the reason that the latter are not considered nuisances *per se* as the former are. *Underwood v. Green*, 42 N. Y. 140. The property rights in the latter cannot be disregarded so long as the same are not actual nuisances.

In *Landberg v. City of Chicago*, 237 Ill. 112, the validity of an ordinance providing for the designation of places for the receiving and shipping of manure and the granting of an exclusive privilege for the establishment and maintenance of such stations was in question. The complainant had been engaged in this business and asked that the city be enjoined from enforcing said ordinance. The court said (page 117):

“The removing of manure from the city and the sanitary handling and proper care of the same while at shipping stations within the city have a substantial relation to the promotion of health and suppression of disease. Accumulations of manure may be fairly regarded as inimical to the public health, and no doubt the city may require the removal of the same, regulate the conduct of the business, prescribe penalties for the infraction of reasonable rules and regulations, require a license of per-

sons proposing to engage in the business, and compel them to give adequate security for the observance of the ordinances and regulations of the city. It would subserve the health of the community to compel the removal of all manure within a specified time; to establish shipping stations at suitable places convenient to railway or water transportation; to require security for obeying all proper regulations and to require the removal of the manure from the shipping stations within a limited time; but the provision of an exclusive privilege to one person upon his paying the amount bid therefor has no relation whatever to the authority conferred upon the city. The grant of a monopoly having no legitimate relation to the purpose to be accomplished by an ordinance is offensive and renders an ordinance unequal and unreasonable as between citizens."

The court refers to the cases of *Walker v. Jameson*, 140 Ind. 591, and *Smiley v. McDonald*, 42 Neb. 5, in which cases ordinances granting a monopoly for the removal of garbage were sustained. But the court says that in these cases express power was given the municipalities by their charters to enact such ordinances.

The court refers to the business of the complainant as a legitimate one which could be regulated, but not destroyed. But the court did not consider the distinction between the case at bar and the cases referred to, namely, that manure is not a nuisance *per se* whereas garbage matter is held so to be. In *Dupont v. District of Columbia*, 20 App. Dist. of Col. 477, the court says on pages 485-588:

"In a recent case we had occasion to consider these same regulations, in so far as they then applied to the removal of dead animals. The proof having shown that a horse had just died, that the carcass was neither offensive nor in a condition, to endanger the public health, that it had a market value in its then condition, and that the owner had removed it within a reasonable time in a wagon conforming to all the requirements. We held that the regulation practically prohibited the owner from removing and utilizing his property under such circumstances was in excess of the police power and an unreasonable invasion of his rights; in other words, that the animal had not ceased to be property by its death and was removed before it could be lawfully declared a nui-

sance. *Campbell v. District of Columbia*, 19 App. D. C. 131.

Many of the decisions relied on by the defendant in error in that case had relation to regulations concerning the disposition of garbage, and referring thereto it was said: 'It may well be that from the nature of garbage a different rule would apply; but that phase of the question is not involved and we express no opinion upon it.' It is now fairly presented, and after much consideration we are of the opinion that a different rule does apply.

* * *

The distinction between the two cases is clear. The carcass was valuable, had undergone no decay whatever, and was promptly removed in a wagon of approved construction. The death of a horse is of comparatively infrequent occurrence and not capable of producing constant, widespread apprehensions of danger or discomfort.

Garbage, as we have seen, is necessarily composed largely of matter noisome even before its deposit in the receptacles provided for it, and other matter mingled with it must necessarily partake of its offensive character. Moreover, it is a thing of almost hourly accumulation in every occupied house of a large city, and is therefore a constant menace to the health and comfort of thousands of people. These conditions amply justify the application of a different rule as regards its collection, removal, and final disposition."

State v. Orr, 68 Conn. 101, 112.

Gardner v. Michigan, 199 U. S. 325, 330.

The grant of an exclusive privilege for the removal of garbage has been generally held a valid exercise of the police power having a legitimate relation to the prevention of its accumulation and to its sanitary removal and destruction. In *California Reduction Company v. Sanitary Reduction Works*, 199 U. S. 306, the court sustained the validity of an ordinance which granted to one person the exclusive right to cremate and destroy garbage, prescribing the maximum amount to be charged by said company for the collection of same, requiring all garbage to be delivered at said company's plant at the expense of the producer of same, and also providing for the removal and disposition of dead animals not removed or disposed of by the owners within six hours after

the death of same. The question of the validity of the ordinance for want of power in the board of supervisors to adopt the same arose, but the court held that the power granted to abate nuisances and to make all regulations which might be necessary or expedient for the preservation of public health and the prevention of contagious diseases was sufficient.

The court says (pp. 320-321-323) :

“We perceive no ground to doubt the good faith of the Board of Supervisors; nor can we say that the mode adopted for the suppression of the evils in question was arbitrary or did not have a real, substantial relation to the protection of the public health. * * *

The defendants insist that the requirement that the substances mentioned should be delivered at the plaintiff's works for cremation or destruction, at the expense of the person, company or corporation conveying the same, was a taking of private property for public use without compensation. We cannot assent to this view. It is the duty, primarily, of a person on whose premises are garbage and refuse material to see to it, by proper diligence, that no nuisance arises therefrom which endangers the public health. The householder may be compelled to submit even to an inspection of his premises, at his own expense, and forbidden to keep them or allow them to be kept in such condition as to create disease. He may, therefore have been required, at his own expense, to make, from time to time, such disposition of obnoxious substances originating on premises occupied by him as would be necessary in order to guard the public health. If the householder himself removed them from his premises, it must have been at his own expense; and the scavenger who took to the crematory the material from the premises of origin, under some arrangement with the householder, was, in effect, the representative in, in that matter, of the householder, and was performing a duty resting upon the householder. So that, if the requirement that the person conveying the material should pay a given price for having it cremated or destroyed, in effect, put some expense on the householder, that gave him no ground for complaint; for it was his duty to see to the removal of garbage and house refuse, having its origin on his premises. * * *

The authorities were not bound, prior to the removal of such substances from the premises on which they were found, to separate those that were confessedly worthless from those which might be utilized. The garbage and

refuse matter were all together, on the same premises, and as a whole or in the mass they constituted a nuisance which the public could abate or require to be abated, and to the continuance of which the community was not bound to submit. And when the obnoxious garbage and refuse were removed from the place of their origin and put in covered wagons to be carried away, the municipal authorities might have doubted whether the substances that were *per se* dangerous or worthless would be separated from such as could be utilized and whether the former would be deposited by the scavenger at some place that would not endanger the public health * * * the cremation and destruction of garbage and house refuse, under the authority of the municipal authorities, proceeding upon reasonable grounds, and at a place designated by law, as a means for the protection of the public health, cannot be properly regarded, within the meaning of the Constitution, as a taking of private property for public use, without compensation, simply because such garbage and house refuse may have had, at the time of its destruction, some element of value for certain purposes."

Grand Rapids v. De Vries, 123 Michigan 570.

Smiley v. McDonald, 42 Nebr. 5.

Iller v. Rois, 64 Nebr. 710.

Louisville v. Wible, 84 Ky. 290.

A municipality may require the producer of garbage to pay for the expense of removing the same. In *Walker v. Jameson*, 140 Ind. 591, express power having been given the municipality to contract for the removal of garbage, the court says (p. 602):

"The right of removal by contract or otherwise being vested in the city, it was for the common council to determine whether the work should be paid for out of the city treasury or by the person producing the garbage, and their action is not subject to review here. It may be that the hotel and restaurant keepers will lose money on their garbage under the workings of this contract, where they before derived a revenue, but if, under this plan, the sources of contagion and disease will be more speedily and effectively removed, the city was empowered to make this contract."

In *Smith v. City of New Albany*, 175 Ind. 279, the court says (p. 287):

"It is fairly settled, with some reservations, as to

rights of property in the owners of dead animals that municipal corporations may confer upon individuals the exclusive right to remove such animals, as well as other offensive matter, upon the theory that in practical application the object can be accomplished better by those prepared to do the work; that it is within the discretion of the municipal authorities to contract for the accomplishment of the results under a general system; and that such legislation is reasonable in itself, and intended to preserve health and to create conditions least offensive to the senses. (Authorities cited.)”

In re Zhizhuzza, 147 Calif. 328, in sustaining an ordinance requiring the payment of a fee for the removal of garbage, the court says (p. 335):

“It is further claimed, on behalf of the petitioner, that the ordinance in question is an admitted police regulation, and is unconstitutional because its scope exceeds the police power of the City of Oakland; that the city does not possess the power of invading private premises and removing garbage therefrom—garbage not being a nuisance *per se*.

The removal and disposition of garbage, as well as the regulation of slaughter-houses in cities and towns, is peculiarly a subject of municipal control, as without proper regulation either might become an intolerable nuisance and dangerous to the health and lives of the citizens.”

California Reduction Company v. Sanitary Reduction Works (supra).

The decisions of the courts herein set out having sustained the validity of the various ordinances before them on the theory that garbage is *per se* a nuisance and that power to enact such ordinances may be derived from general health and police powers, I am of the opinion that the city by ordinance.

1st. May compel all producers of garbage within the city to turn the same over to the city or its authorized agents.

2nd. May require the delivery of garbage to a specified plant or disposal station at the expense of the producer.

3rd. May regulate in any manner and if desired may prohibit any one other than its authorized agents from collecting garbage and carting the same through the city.

4th. May collect the garbage in the city and charge a reasonable fee therefor.

In reaching the above conclusions, I am not to be understood as meaning that all matter which may be laid aside in the preparation of dishes for the table is necessarily garbage and therefore subject to the same regulation in all respects for there may be some things as, for example, meat trimmings, fruit and vegetable parings and the like, that are capable of unobjectionable uses. This, the owner could not be compelled to throw away, but might make any reasonable use of before they could become offensive. But when such matter is mingled with garbage it becomes likewise subject to public control, notwithstanding that, in some instances, the owners might be able to dispose of it for a price to persons willing to handle and make use of it, in its unreduced state.

Respectfully submitted,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

SEPTEMBER 6, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In the matter of the application of Barney Ostrowsky for a license to keep a saloon at 1042 West 12th street, it appears from the plat accompanying the application that the entrance to the proposed saloon is 294.5 feet from the main entrance or gateway to the premises of St. Ignatius College which is located on West 12th street west of the proposed saloon. The main entrance to the college building is about 19 feet back from the street line and directly north of said entrance gate. The east wall of the college building is about 80 feet east of the said gate.

The eastern boundary of the grounds surrounding the college building is 180.8 feet from the entrance to the proposed saloon. There is a gateway located on West 12th street at the eastern end of the college grounds, which is used by the students as an entrance to the college and academy. The eastern side of this students' gate is 186.7 feet and the west side thereof 194.7 feet from the entrance to the proposed saloon.

The question under consideration involves an application of the regulation against granting a license to keep a saloon within 250 feet of a school.

In the case of *Harrison v. The People*, 222 Ill. 150, the Supreme Court dealt with a petition for mandamus to compel the Mayor of Chicago to grant a license to keep a saloon, which license had been refused on account of the proximity of the proposed saloon location to the grounds of the Lyman Trumbull public school.

The court in its opinion treated the school *grounds* as a part of the school premises and justified the Mayor's refusal to grant the license on account of the proximity of the proposed saloon to the school *grounds*.

In the case of *Kretzmann v. Dunn*, 228 Ill. 31, the Supreme Court sustained the Mayor of Chicago in refusing to grant a license to keep a saloon about 125 feet distant from the grounds of the House of the Good Shepherd although the buildings used by the institution were located about 500 feet from the proposed saloon location, and the side of the grounds facing in the direction of the proposed saloon was enclosed by a brick wall 10 feet high.

In the case of *County of Cook v. Sesterhenn*, Judge Tuley rendered in a decision in 1904 to the effect that under the State charter of the Northwestern University, which provided that intoxicating liquors should not be sold within four miles of the location of said university, the measurement should be taken from the point of the university grounds nearest to the proposed saloon.

The manifest purpose of the regulation in respect to the distance between a saloon and a school is to have the students and the faculty of the school separated by not less than the specified distance from the influences of the saloon. It is apparent that this purpose would not be met if a saloon were permitted to be located within 250 feet of the gate or entrance to the school grounds used by the students in availing themselves of the advantages of the school.

Inasmuch as in the case under consideration the students' gate is less than 200 feet from the location of the pro-

posed saloon, we are of the opinion that the 250 foot regulation requires a refusal of the application for a license.

Yours respectfully,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 6, 1913.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

In your letter of recent date you called attention to the ordinance authorizing the issuance of \$380,000 worth of Health Department building bonds, published on page 2816 of the Council Proceedings of February 19, 1912.

You state further that the proceeds of the bonds are to be used for acquiring the necessary sites and constructing certain buildings for the Health Department, but that no mention is made in the ordinance authorizing the issuance of bonds as to the amount to be expended on any particular site or building. You then call attention to the fact that the budget for the year 1912 included appropriations to be paid for out of these bonds to the extent of \$380,000, that being the amount of the bond issue, and you want to know whether the appropriation bill items have any bearing on the disposition of the proceeds of the bonds sold under the ordinance authorizing their issuance.

The appropriations of 1912 are now no longer in force, and, so far as the moneys have not been expended, they can be regarded as having been done away with entirely, consequently they can have no bearing on the manner of disposing of the money realized on the bonds.

The general rule with regard to the issuance of bonds is that we must look to the ordinance authorizing their issuance for directions as to the use of the money. An appropriation made about the same time in the regular annual appropriation bill, or before the bond ordinance was passed, as in this case, has no direct bearing on the disposition of same except to

the extent that if the bond ordinance does not conflict with the appropriation ordinance the latter authorizes the expenditure of the money.

But, if for some reason the money is not used under the authority of the appropriation bill and remains on hand until the following year, the appropriation of the year before carries with it no obligation to use the proceeds of the bonds in precisely the same manner as was at first intended.

A new appropriation directing the expenditure in a different way, as long as it comes within the general provisions of the bond ordinance, will be entirely valid, and will authorize the expenditure of the money in accordance with the terms of such new appropriation.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 9, 1913.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

During the past few weeks several refund certificates from the Clerk of the Municipal Court have been handed me by Mr. O'Connor of your department for an opinion as to whether or not the same should be honored and paid by the city.

There seems to be prevalent an impression that moneys paid to the Municipal Court by mistake of fact may properly be refunded upon order of the Clerk of the Municipal Court. I deem it advisable therefore to re-state the position of this office on this matter.

Fees paid the Clerk of the Municipal Court are not deposits, but are pre-requisite payments provided for by the statute to be paid before the services of the court can be obtained. Upon such payment the court must perform such services as the party making payment is entitled to, if it can, and this court must ever hold itself ready to do. Costs paid

voluntarily cannot be recovered back because of a mistake of law or fact made either by the party paying or the party paid.

Powell v. Bunger, 79 Ind. 468.

Thompson v. Doty, 72 Ind. 336.

Clague v. Hodgson, 16 Minn. 329.

Bobb v. Dillon, 20 Mo. App. 309.

I am also submitting herewith a list of authorities pertaining to the question of refunding license fees which hold that voluntary payments to a municipality cannot be recovered.

I desire therefore to advise you that no municipal court costs should be refunded which have been paid voluntarily.

Very truly yours,

LORING R. HOOVER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 10, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In response to your request for a synopsis of the law relative to the valuation of plants as going concerns we beg leave to submit the following:

There seems to have been no occasion for passing on the significance of the term "going concern," as used in contracts of purchase and sale of a business until municipalities began to take over the plants of public service corporations.

Before that the phrase was used in connection with and understood to be a part of the good will of the concern.

But while it was at first considered only in connection with the good-will of a business, it was always understood to have a meaning which would entitle it to consideration apart from the idea of prospective profit. It was frequently held that it applied to a concern that was insolvent but still prosecuting its business.

Corey v. Wadsworth, 99 Ala. 68.

Oliver v. Lansing, 59 Neb. 219.

White v. Pettes Imp. Co., 30 Fed. 864.

The question of what should be included within the meaning of these words became a very live issue, however, as soon as public service concerns were purchased especially when the sale took place upon the expiration of a franchise, which of course could no longer be considered of value. So recently did the question arise that all the law on this subject that appears in the reports has been given utterance to within the last twenty years.

A very valuable work on the subject was compiled in 1912 by Robert H. Whitten, Ph. D., who collates all the cases down to the present day. A summary in this book is directly in point, and we therefore quote it in full.

“Sec. 236. Summary.

The legal conception of going concern as a distinct and separate element of value owes its origin to cases involving the public purchase of public utility plants under terms that excluded a valuation based on the value of the franchise or net earnings. Early condemnation cases were based on value of the property and franchise or on total value as a going concern. It was unnecessary to separate going concerns value from franchise value and in most cases no attempt was made to fix a separate franchise value, but the entire property was simply valued as a going concern and usually upon a net earnings basis. When with the growing trend toward municipalization of water plants, either through franchise stipulations or the threat of competition, the companies agreed to the purchase of their plants at their fair value but without allowance for the franchise, the question arose as to whether in fixing such fair value there should be any addition to structural value on account of the fact that the plant was in actual operation and had an established business. In the comparatively few cases in which this precise question has been presented, it has with practically no exception been answered in the affirmative. Starting with the Kansas City purchase case in 1894, Justice Brewer stated that the ‘established connections,’ the ‘system in operation’ and ‘actually earning’ were elements of value (. . .). In 1897 and 1901 the Massachusetts Supreme Court cited the above and approved an added value because ‘the plant was a going concern and in full operation.’ (. . .) In 1904 the Connecticut Supreme Court approved an addition to structural value on account of the ‘established business, built up

after experiments and changes during a long period.' (. . .) Then in 1910 the same question came for the first time before the Supreme Court of the United States and Justice Lurton states that: 'The value in equity and justice must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. The difference between a dead plant and a live one is a real value and is independent of any franchise to go on, or any mere good will as between such plant and its customers.' (. . .) Aside from valuations made by the Wisconsin Railroad Commission and which are fully described in chapter 24, the above are the only *purchase* cases found in which going concern has been considered entirely apart from the value of the franchise. The opinions in the above cases throw no light on the method by which going concern may be calculated. They seem to point, however, to commercial value rather than to cost or investment as the basis of determination."

Whitten, Valuation of Public Service Corporations, Sec. 536.

The courts have very generally held that in case of purchase the going value is an element to be taken into consideration as an entirely distinct and separate thing from the value of the franchise or the prospective profits.

Justice Brewer of the U. S. Supreme Court, in *National Waterworks Co. v. Kansas City*, 62 Fed. 853, in passing on the question, used the following language:

"It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is today. A completed system of water works, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city—not only with a capacity to earn, but actually earning—makes it true that 'the fair and equitable value' is something in excess of the cost of reproduction."

In another case where a plant was purchased under a

legislative act which provided that in case of disagreement "the fair cash value of said property * * * shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of such company," the court said:

"The provisions of the act are that the 'fair value * * * shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of said company.' Whether that would allow present earning capacity and present good will, apart from the franchise, to be taken into account, as distinguished from future earning capacity and future good will, need not be considered. It is plain that the element of value, which comes from the fact that the property is sold as a going concern, in which case it has, or may have, in fact, a greater market value than the same property reproduced in its physical features, is not excluded from consideration by that provision of the statute."

Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365.

In another case of a similar nature Justice Lurton of the U. S. Supreme Court gave expression to the following:

"The option to purchase excluded any value on account of unexpired franchise; but it did not limit the value to the bare bones of the plant, its physical properties, such as its lands, its machinery, its water pipes or settling reservoirs, nor to what it would take to reproduce each of its physical features. The value in equity and justice must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. The difference between a dead plant and a live one is the real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers. That kind of good will, as suggested in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, is of little or no commercial value when the business is, as here, a natural monopoly, with which the customer must deal, whether he will or no. That there is a difference between even the cost of duplication, less depreciation, of the elements making up the water company plant, and the commercial value of the business as a going concern, is evident. Such an allowance was upheld in *National Waterworks v. Kansas City*, 62 Fed. Rep. 853, where the opinion was by Mr. Justice Brewer. We can

add nothing to the reasoning of the learned justice, and shall not try to. That case has been approved and followed in *Gloucester Water Co. v. Gloucester*, 179 Massachusetts 365, and *Norwich Gas Co. v. City of Norwich*, 76 Connecticut 565."

, *Omaha v. Omaha Water Co.*, 202 U. S. 180.

The foregoing eminent authorities from which we have quoted at length, and other similar authorities which might be cited, all hold that an allowance for a plant as a going concern is proper and reasonable, even though its franchise is by the terms of the agreement or by the law or the peculiar conditions in the case not to be taken into consideration.

With regard to the question whether any allowance for development expenses was proper under a contract providing for an appraisalment as a going concern, we find that in those cases where the appraisers have actually made an allowance of this kind the courts have not set it aside. We do not find, however, that such allowance is necessarily included in the term "going concern" when used in a contract of sale.

We are of the opinion that it would have to be specifically mentioned in the contract in order to place upon the appraisers the obligation to consider such development expenses, although they could consider them voluntarily with perfect propriety.

As illustrating the view that the courts take of such an allowance when it has actually been made we quote the following:

"An established railroad system may be worth more than its original cost and more than the mere cost of its physical reproduction. It has passed the initial period of little or no return to its owners which, of greater or less duration, almost always follows construction and is not unfrequently marked by default and bankruptcy. The inevitable errors in its building which finite minds and hands cannot avoid have been measurably corrected, time and effort have produced a commercial adjustment between it and the country it was intended to serve, relations have been established up and made tributary. In other words, the railroad, with patrons, and sources of traffic have been opened unlike one newly constructed, is fully equipped and is doing business as a going concern. It has attained a position after many experiences common to railroad enterprises which entail loss and cost

not paid from the current earnings, and which correspondingly make for value.”

Missouri, etc., R. Co. v. Love, 177 Fed. 493.

In another case the court sanctioned the work of the appraisers where they “had also taken into account * * * the fact that the plaintiff has an established business, built up at the risk of private capital, after experiments and changes during a long period.”

Norwich G. & E. Co. v. City of Norwich, 76 Conn. 565.

There being no fixed rule by which the appraisal of this element of value, if it exists, must be considered we can only look to such decisions as the above for light on the subject.

While the above synopsis could be extended, we believe we have sufficiently covered the field of inquiry to give you a full exposition of the attitude of the courts in regard to these matters.

Yours respectfully,

LORING R. HOOVER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 12, 1913.

HON. RAY PALMER, City Electrician.

Dear Sir:

We are in receipt of your favor of July 29th, relative to the lighting of subways in which you state among other things as follows:

“The list sent you on November 7th, refers to certain ordinances in which the lighting clauses are so indefinitely worded or in which the authority exists in the original ordinance but not in the amendment and it is necessary to get an opinion from your department in each case before we can determine whether the city shall light the subways involved or whether they should be listed among those which the railroad companies are to light.”

Section 2202 of the Chicago Code of 1911 is as follows:

“2202. Lights at crossings.) Every person or corporation owning or operating any steam, elevated or

street railway, whose track or tracks cross or intersect at, above or below the grade of any of the streets within the city, shall and they are hereby required to provide at their own expense proper and sufficient lights, and care for the same at all such crossings or intersections. Such lights shall be of such kind as may be approved by the commissioner of public works."

Our Supreme Court in the case of *City of Chicago v. The Pennsylvania Company*, 252 Ill. 185, declared said ordinance invalid. Consequently none of the railroad companies can be compelled to light subways by virtue of same except in the ordinances hereinafter named in which the companies accept the provisions of the ordinances so requiring a lighting thereof. In such cases they are liable and if they do not illuminate the subways the City ought to do so as a protection to the public and commence suit for the amount of expenses incurred by it in so doing.

The following is a list of the names of the companies who are legally liable to light the subways, the location thereof and the dates of the ordinances under which they are found. In these cases the companies filed their acceptances of the provision requiring the lighting and are, of course, liable thereunder.

1. The ordinance passed July 11, 1910 (Chicago Track Elevation Department Compilation, pp. 144-165), effective as to C. M. & St. P. Ry. Co. (Evanston Division), location of subways from Montrose avenue to Howard avenue. Said company accepted provisions of ordinance on August 4, 1910. (Council Proceedings, p. 1357.)

2. The ordinance passed April 5, 1911 (Chicago Track Elevation Department Compilation, pp. 202-208), effective as to C. & A. R. R. Co. Location of subways from Stewart avenue to California avenue. Said company accepted provisions of ordinance on May 8, 1911. (Council Proceedings, p. 86.)

3. The ordinance passed June 28, 1909 (Chicago Track Elevation Department Compilation, p. 36), effective as to I. C. R. R. Co. Location of subways from 69th street to 75th street. The company accepted provisions of ordinance on August 19, 1909. (Council Proceedings, p. 1133.)

The following list contains the names of the companies,

the location of subways and other data of those that are not legally liable because of their failure to light the same owing to the fact that there are no acceptances of provisions by the companies in the ordinance to the lighting and because of the invalidity of Section 2202, as aforesaid.

4. The ordinance passed March 23, 1903, Chicago Track Elevation Department Compilation, pp. 605-617, effective as to C. & N. W. Ry. Co. (Milwaukee Division), location of subways Bryn Mawr avenue to city limits.

5. The ordinance passed March 30, 1896 (Chicago Track Elevation Department Compilation, p. 132), effective as to C. & N. W. Ry. Co., location of subways Montrose avenue to Roscoe street.

6. The ordinance passed January 13, 1902 (Chicago Track Elevation Department Compilation, p. 464), effective as to C. M. & St. P. Ry. Co. (C. B. Division), location of subways 40th avenue to city limits.

7. The ordinance passed January 13, 1902 (Chicago Track Elevation Department Compilation, p. 464), effective as to C. & N. W. Ry. Co. (Mayfair cutoff), location of subways 46th avenue, North avenue, Addison avenue, Kinzie street to North avenue and to Grand avenue.

8. The ordinance passed January 29, 1906 (Chicago Track Elevation Department Compilation, p. 677), effective as to C. & N. W. Ry. Co. (Galena Division), location of subways 46th avenue to city limits.

9. The ordinance passed February 11, 1901 (Chicago Track Elevation Department Compilation, p. 429), effective as to C. M. & St. P. Ry. Co. and C. & N. W. Ry. Co., location of subways Kinzie street, Ashland avenue to Western avenue.

10. The ordinance passed October 22, 1906 (Chicago Track Elevation Department Compilation, p. 749), effective as to C. T. T. R. R. Co. (but what is now known as B. & O. C. T. R. R. Co.), location of subways Fillmore street—Rockwell street to city limits.

11. The ordinance passed February 3, 1902 (Chicago Track Elevation Department Compilation, p. 485), effective as to C. & G. T. Ry. Co. and Indiana Harbor R. R. Co., location of subways Halsted street to Western avenue.

12. The ordinance passed March 16, 1903 (Chicago Track Elevation Department Compilation, p. 573), effective as to C. J. Ry. Co. and U. S. Y. & T. Co., location of subways Root street and Halsted street to the Lake.

13. The ordinance passed June 25, 1906 (Chicago Track Elevation Department Compilation, p. 712), effective as to L. S. & M. S. Ry. Co., location of subways 73rd street to 103rd street.

In view of the above, therefore, we are of the opinion that in said first list numbered from 1 to 3 inclusive the said companies are liable in the event they do not light the subways because along of their acceptance of said ordinance, while in the said second list numbered from 4 to 13 inclusive, the companies are exempt from liability.

Respectfully,

EDWARD J. QUEENY,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 18, 1913.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

Your communication of September 3, 1913, relative to the location of a garage at the northeast corner of West Division street and Claremont avenue has been referred to me for reply.

In your communication you state that an alley runs between Claremont and Oakley avenues in an Easterly and Westerly direction, that there is a school located on Oakley avenue, the school grounds commencing 25 feet north of the said alley, that the distance from the northeast corner of the proposed new garage to the said school grounds or school building is less than 200 feet, though it is proposed to have the entrance to the garage on Division street and no other entrance excepting that to the garage, and if the distance is measured in the usual mode of travel, which would be on Division street east to Oakley avenue and north to the school grounds, or on

Claremont avenue to Potomac avenue which is the next street north of Division street and thence to the school; or from the entrance of the garage on Division street to Claremont avenue and thence by the alley to Oakley avenue and to the school grounds, the distance would be greater than 200 feet.

The question then is, in determining whether the school grounds are within the restricted two hundred feet, shall the distance between the two places be measured in a straight line or shall it be measured according to the shortest usual mode of travel.

The cases deciding the manner in which such measurement should be taken are not uniform, some holding that the distance should be measured according to the shortest way of travel between the two buildings.

In re Underhill, 39 N. Y. Sup. 575.

Trustees of Warren Street Chapel v. Board of Commissioners, 56 N. J. L. 411.

See also :

Leigh v. Hind, 9 B. B. & C. 774, and English cases cited.

The majority of cases hold, however, that the distance should be measured in a straight line between the buildings.

Sheehey v. Johnson, 12 App. Cas. (D. C.) 92.

Jones v. Commissioners, 106 N. C. 436.

Commonwealth v. Jones, 142 Mass. 572.

Dingman v. Walker, 28 L. J. Ch. 867.

Love v. Porter, 93 Ala. 384.

In re The Liquor Locations, 13 R. R. 733.

State v. Greenway, 92 Ia. 472.

Butler v. State, 89 Ga. 821.

The ordinance for the keeping of a garage is governed by Section 2684 of the Chicago Code for 1911 and provides, among other things, that it shall be unlawful * * * "to locate, build, construct or maintain any garage within 200 feet of any building used as and for a hospital, church or public or parochial school or the grounds thereof." * * *

In construing ordinances in cases of doubt the rule that is generally resorted to is to ascertain the intent of the City

Council in the passage of said ordinance. The above clause was without doubt inserted therein for the purpose of protecting the school children from any annoyance by unnecessary or preventable noises and to safeguard their persons from any danger of the likelihood of fire or explosion or the danger of being injured by numerous automobiles going into and coming out of garages in the neighborhood of the school building.

A further reason can be advanced why a garage should not be in the immediate vicinity of a school building is that the noises naturally issuing therefrom would interfere with the pupils and the teaching force of the school.

Therefore, we are of the opinion that in view of the many authorities cited above and of the intent of the framers of the ordinance that the rule to be adopted in the issuing of permits, etc., to the conducting of garages would be that of measuring the distance by the shortest line and not by the usual route of travel, and hence if the proposed garage is within 200 feet of the school grounds in question a building permit should not be issued.

Respectfully,

M. W. CAGNEY,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 18, 1913.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

We are in receipt of your communication of the 15th inst. requesting an opinion as to whether in the proposed ordinance now under consideration by your committee, in respect to a comprehensive system of subways for passenger transportation, the right could legally be granted to operate the subway and railway therein for a period of twenty years from the time of the completion of the subway and its readiness for operation.

Section 3 of an act of the Legislature of Illinois entitled "An Act in regard to street railroads and to repeal certain acts herein referred to," approved and in force March 7, 1899, provides that no company incorporated under the general laws of this State for the purpose of constructing, maintaining or operating any street railway shall have the right to locate or construct its road upon or along any street or alley or over any public ground in any incorporated city without the consent of the corporate authorities of such city and that such consent may be granted for any period *not longer than twenty years*.

Section 1 of an act of the Legislature entitled "An Act to authorize cities to acquire, construct, own, operate and lease street railways, and to provide the means therefor," approved May 18, 1903, in force July 1, 1903 (commonly called the "Mueller Law" is in part as follows:

"That every city of this State shall have the power to own, construct, acquire, purchase, maintain and operate street railways within its corporate limits, and to lease the same or any part of the same to any company incorporated under the laws of this State for the purpose of operating street railways *for any period not longer than twenty years* on such terms and conditions as the City Council shall deem for the best interests of the public."

Section 6 of said Mueller Law is in part as follows:

"Nothing in this act contained shall be construed to authorize any city to make any street railway grant, or to lease any street railway property, *for a period exceeding twenty (20) years from the making of such grant or lease.*"

Section 1 of an act of the Legislature entitled, "An Act to Authorize cities to acquire, construct, own and to lease or operate public utilities and to provide the means therefor," approved June 26, 1913, provides among other things that any city in this State shall have the power, subject to the provisions of said act, to acquire, construct, own and operate any public utility the product or service of which, or a major portion thereof, is or is to be supplied to the city or its inhabitants and to lease any public utility owned by the city to any corporation organized under the laws of this State for the purpose of operating such public utility *for a period not longer than twenty years*.

It is apparent from the statutory provisions above referred to that the city can not legally make any street railway grant or lease any street railway property owned by it for a period exceeding twenty years.

Section 6 of the Mueller law (above quoted from) expressly negatives the authority of any city to make any street railway grant or to lease any street railway property for a period exceeding twenty years "*from the making of such grant or lease.*"

If the ordinance should attempt to grant the right to operate the subway and railway therein for a period of twenty years from the *making of the grant*.

If the ordinance should provide for the construction of the subway by the grantee company and should also provide for the passage of a second ordinance upon the completion of the subway which should grant to the grantee company the right to operate the subway for a period of twenty years from the passage of such second ordinance, such provision for the passage of the second ordinance would not be valid or binding, for the reason that it would be an attempt on the part of the City Council passing the first ordinance to control the action of a future council.

We are of the opinion that the period of the grant can not exceed twenty years from the making of the grant, that is, from the passage of the ordinance containing the grant.

Yours truly,

JOHN W. BECKWITH,
BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 22, 1913.

HON. GEORGE B. YOUNG, Commissioner of Health.

Dear Sir:

In reply to your inquiry of the 12th inst., as to the scope of the authority vested in you to purchase supplies and make sales of by-products in connection with the city's oper-

ation of a garbage reduction plant, I beg to submit the following:

Supplies for such plant may be purchased in the same manner as now provided by the city ordinances for the purchase of other supplies by your department. When the cost of such supplies is less than the sum of \$500, the purchase of same will be governed by Section 2517 of the Chicago Code. When the cost exceeds the sum of \$500, purchase must be made as provided for by Section 50 of the Chicago Code of 1911, which is as follows:

“50. CONTRACTS EXCEEDING FIVE HUNDRED DOLLARS—BY WHOM LET.) All contracts for work, material, or supplies of any kind or nature, let by any officer of the city, where the amount of such contract exceeds five hundred dollars, shall be let to the lowest responsible bidder, after advertising the same. All such contracts before becoming of any effect shall be approved and countersigned by the comptroller.

“Advertisement shall be made and bids submitted and received by the proper officer in the same manner as is provided for the letting of contracts in and by the provisions of this ordinance concerning the letting of contracts by the department of public works.”

Such contracts will also be governed by the provisions of Article X, Chapter LVIII of the Chicago Code of 1911. By the provisions of Article X above referred to you could make contracts exceeding the sum of \$500 for the purchase of supplies without advertisement or bids by a vote of two-thirds of all the aldermen elected.

That cities have power to dispose of surplus products in connection with the operation of public utilities, etc., cannot be questioned. The authorities are ample to sustain such power.

The question therefore remains as to the procedure to be followed in the sale of such by-products. In this matter the following statutory provisions control (Hurd's Revised Statutes, Chapter 24, Sections 41, 623 and 624):

“41. YEAS AND NAYS—RECORD—VOTE REQUIRED.)

§ 13. The yeas and nays shall be taken upon the passage of all ordinances, and on all propositions to create any liability against the city, or for the expenditure or ap-

propriation of its money, and in all other cases at the request of any member, which shall be entered on the journal of its proceedings; and the concurrence of a majority of all the members elected in the city council shall be necessary to the passage of such ordinance or proposition: *Provided*, it shall require two-thirds of all the aldermen elect to sell any city or school property."

"623. IN CITIES HAVING MORE THAN 100,000 INHABITANTS—NOT EXCEEDING FIVE YEARS.) § 1. BE IT ENACTED BY THE PEOPLE OF THE STATE OF ILLINOIS REPRESENTED IN THE GENERAL ASSEMBLY: That any city having a population of more than one hundred thousand inhabitants, as shown by any school census or by the federal census, shall be and hereby is authorized and empowered to make contracts for more than one year and not exceeding five years, relating to the collection and final disposition of garbage and ashes.

"624. CITY COUNCIL TO MAKE ANNUAL APPROPRIATION.) § 2. Whenever any city shall make such contract as is authorized by this act, it shall be and is hereby made the duty of the City Council of such city to include in the annual appropriation ordinance of each current fiscal year, an appropriation of a sum of money, sufficient to pay the amount, which under and by the terms of any such contract, shall become due and payable during such current fiscal year."

The recently enacted public utilities law in no way affects this matter. Inasmuch as the city would operate such a plant by virtue of its police power—there being no statutory provisions other than those above quoted regulating the method of procedure in this case—the manner of selling by-products is one to be governed by council action. At the present time the City Council has passed no ordinance covering this question. In passing such an ordinance the council should keep in mind the provisions of the Cities and Villages Act and should adopt an ordinance consistent with it.

Such an ordinance could appropriately provide that sales amounting to less than \$500 could be made by you without advertisement, subject, however, to certain regulatory provisions as to your procedure in the making of such sales somewhat similar in their purpose as the requirements of Section 2520 of the Chicago Code relating to purchases made by the business agent. As to the sale of such products, when the

same amounts to \$500 or more, or where contracts are to be entered into for a term, then the same should be subject to the approval of the City Council, or should be made by advertisement and let to the highest bidder.

I conclude that the method to be pursued in the purchase of supplies is governed by ordinances now in force, but the matter of selling by-products is yet to be regulated by the City Council.

Respectfully submitted,
LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 23, 1913.

HON. EDWARD COHEN, City Collector.

Dear Sir:

In reply to your inquiry of the 19th instant, as to whether it will be necessary to secure a license to give an exhibition such as is mentioned in a communication to you from Captain William F. Knoch at which no admission fee is to be charged, has been referred to me for reply.

Section 106 of the Chicago Code of 1911 which classifies amusements, provides in part as follows:

“106. Classification for license.) All theatricals, shows and amusements offered, operated, presented or exhibited for gain, or for admission to which the public is required to pay a fee, are hereby divided into the following twenty-one classes. * * *”

The only question to be determined in this case is whether or not the exhibition desired to be offered is presented for gain.

In *Thorn v. De Breteuil*, 83 N. Y. Sup. 849 the court said, page 856:

“ ‘Gain’ means that which is acquired or comes as a benefit.”

As is stated in the letter of Captain Knoch the exhibition is to be given by the Eastman Kodak Company as an advertising proposition. It cannot be doubted that the exhibition is given for gain by this company. The company, undoubt-

edly, is required to pay for the use of the Armory, and although no admission fee is to be charged the purpose of the exhibition is to ultimately increase the business of said company. I am, therefore, of the opinion that it will be necessary to secure a license for the proposed exhibition.

Yours truly,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 25, 1913.

HARRY G. WILSON, Esq., Secretary, Chicago Public Library.

Dear Sir:

Your verbal request for an opinion as to the authority of your board of directors to award a contract for placing the orders for magazines, to an agency which is absolutely owned and controlled by a young man 16 years of age, has been given due consideration.

It is here only necessary to state that such contracts are not favored in law, and while it has been held that they may not be void, they surely are voidable.

You say the sum involved in this contract is \$4,000 and that this amount would have to be turned over to the contractor before he performs his services.

Under the laws of Illinois there would be no redress should the minor fail in performing his part of the contract.

A careful study of our statutes and the decisions of our courts of last resort lead us to the conclusion that the contract in question should not be entered into by your board.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 25, 1913.

MR. M. FERRY, City Telephone Supervisor.

Dear Sir:

We are in receipt of your communication of the 18th inst. asking whether a sale can be legally made to the American Telephone and Telegraph Company of the properties of the Illinois Telephone and Telegraph Company, in view of the provisions of Section 2 of the ordinance passed by the City Council on February 20, 1899, to the effect that it shall be a condition of the grant in said ordinance made that if the Illinois Telephone and Telegraph Company, or any of its successors or assigns, shall either sell out or enter into any agreement with any existing telephone company, or any of its successors or assigns, doing business in the City of Chicago, which agreement would tend to make competition inoperative, said ordinance should become null and void and the plant of said company together with the conduits, wires and poles then in the streets belonging to said company should be forfeited to the city.

If the American Telephone and Telegraph Company was a telephone company doing business in the City of Chicago at the time of the passage of said ordinance of February 20, 1899, and the Illinois Telephone and Telegraph Company, or any of its successors or assigns, should, without the permission or consent of the City of Chicago, either sell out its telephone plant or business to the said American Telephone and Telegraph Company or enter into any agreement with said company, which agreement would tend to make competition inoperative, then, in our opinion, the ordinance of February 20, 1899, would at the option of the city become null and void and the telephone plant of the company would become subject to forfeiture to the city.

That the two companies concerned recognize the above stated limitation on the right of the Illinois Telephone and Telegraph Company, its successors or assigns, to sell its telephone plant, is indicated by the fact that in connection with the pending negotiations for the sale of said company's telephone plant to the American Telephone and Telegraph Company an ordinance was presented to the City Council on June

2, 1913, and by it referred to the Committee on Gas, Oil and Electric Light, amending the said ordinance of February 20, 1899, by striking therefrom the above referred to clause in respect to the right of the Illinois Telephone and Telegraph Company to sell its telephone plant. This proposed amendatory ordinance is now under consideration by the said committee.

Your communication further requests "extracts from any other ordinances relating to the subject of sale for acquisition by the city of the plant or properties of the existing Chicago Automatic Telephone system."

The several ordinances granting rights to the Illinois Telephone and Telegraph Company, its lessees or assigns, are as follows:

(1) Ordinance passed on February 20, 1899, C. P. 1692 to 1696.

(2) Ordinance passed on July 15, 1903, C. P. 914 to 921.

(3) Ordinance passed on July 20, 1903, C. P. 928 to 929.

(4) Ordinance passed on February 1, 1909, C. P. 2602 to 2604.

(5) Ordinance passed on June 26, 1909, C. P. 911 to 914.

The provisions in respect to acquisition by the city of the telephone plant or properties of the (so-called) Chicago Automatic Telephone system, including acquisition by purchase, expiration of grant and forfeiture may be found in the following sections of the above mentioned ordinances:

Sections 2 and 8 of the ordinance of February 20, 1899; Sections 1 and 6 and Section 11 (as amended by Section 1 of the ordinance of February 1, 1909, and Section 1 of the ordinance of June 26, 1909) and Section 13 of the ordinance of July 15, 1903; Section 1 of the ordinance of February 1, 1909 and Section 1 of the ordinance of June 26, 1909.

You doubtless have copies of the ordinances above men-

tioned and can readily turn to the sections thereof above referred to.

Yours very truly,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 29, 1913.

MR. WILLIAM D. CASSIDY, Clerk, Municipal Pension Fund,
Chicago, Illinois.

Dear Sir:

We have your communication of September 13, 1913, in regard to the above matter, and upon investigation we find that on January 28, 1913, the City of Chicago entered into a contract with the American Development Company whereby the lamp lighting, fitting, cleaning and repairing were turned over to the company. The contract is for the year ending December 30, 1913, and was entered into pursuant to an order passed by the City Council January 27, 1913 (see Council Proceedings of that date on page 2447).

The question arises whether these facts in effect abolished the positions of gas lamp lighters, fitters, cleaners and repairers in the Department of Electricity who, prior to the execution of the contract, were civil service employes charged with the work now done by the American Development Company.

If their positions were abolished, they are entitled to a refund of all money contributed by them under the sixth clause of Section 4 of the Act creating the municipal pension fund, provided they were in good standing at the time of the abolishment of their positions.

The abolishment of a civil service position must be distinguished from a temporary lay-off, during which time an employe is required to pay into the fund the sum of \$2 each month to the treasurer of the city in order to retain his rights to the benefits of the Act.

A position may be abolished by the City Council or the executive officers of the city when the position is no longer

necessary or for reasons of economy. (2 Dillon on Mun. Corp., 5th Ed., Sec. 479.) And we have heretofore held that failure of the City Council to appropriate for a position in effect abolishes that position. (See *Fitzsimmons v. O'Neill*, 214 Ill. 494-505.)

Where the work done by employees is discontinued by the city, their positions are thereby abolished, but a mere temporary cessation of work does not constitute a discontinuance thereof so as to justify the abolition of the place. (*People ex rel. Broderick v. Morton*, 24 N. Y. App. Div. 563, 565.)

In the case under consideration, the work formerly done by the city has been taken over by the American Development Company. The appropriation referred to in your communication was apparently not limited to the salaries or wages of lamp lighters but covered the contract with the Development Company then contemplated. The appropriation reads as follows:

“Lamp lighters—lighting, cleaning and extinguishing gas lamps, at 1 cent per light per day and caring for mantle gas lamps at 10 cents per lamp per month *or by contract*\$55,800.00”

(See Council Proceedings of February 6, 1913, page 3574.)

In view of the foregoing, we are of the opinion that the positions referred to have been abolished in good faith and the applicants are entitled to a refund if they were in good standing at the time the Development Company took over the work.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 29, 1913.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

Your communication of September 23, 1913, enclosing a letter of protest from Attorney Ambrose Risdon has been referred to the undersigned for reply.

Mr. Risdon protests on behalf of himself and other residents in the vicinity of Forest avenue and Thirty-third street, at which point billboards are being erected, and he makes the point that the party requesting the privilege or benefiting thereby (billboards) cannot sign a frontage consent for property owned by the beneficiary. In this case, it seems the Hahnemann Hospital, which is the beneficiary, signed the frontage consent for 125 feet through a Mr. Haughey. It is contended by Mr. Risdon that if this 125 feet were deducted from the frontage consents, a majority of the frontage consents necessary in the block would then be lacking.

We have reviewed nearly all of the Illinois decisions on frontage consents and do not find that the point has been passed upon by any court of review in this State, except in the leading case of *City of Chicago v. Stratton*, 162 Ill., page 494, where it is considered upon petition for rehearing, as will be seen by this case as annotated in the Lawyers' Reports Annotated 35 (old series) 84 on page 85. The Supreme Court upheld the validity of an ordinance requiring frontage consents for a livery stable, and the appellee upon his petition for rehearing contended, among other things, that:

"A block may be used exclusively for residence purposes, and still a livery stable may be erected and operated by one who owns a majority of the frontage of the block,"

and contending that upon that account the ordinance should be held invalid. The petition for rehearing was denied.

For many other reasons we believe that there is no merit in the contention of Mr. Risdon on this point, for if the right to sign for a frontage consent were denied to the owner of property because he is a beneficiary, and owners of other lots in the block were allowed to so sign, that would amount to an unjust discrimination, and it is the special policy of the law

to avoid such discriminations. Again, one person in a block might own the major portion of the residences therein and still be unable to obtain the privilege sought. Again, in election contests, an elector is not disqualified from voting for himself as a candidate, and frequently election contests are narrowed down to a plurality of one vote.

Therefore, for these reasons we are of the opinion that the beneficiary of a privilege as above described happening to own property within the territory concerned can sign the frontage consents for such privilege.

Yours very truly,

M. W. CAGNEY,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 29, 1913.

HON. JAMES S. MCINERNEY, Prosecuting Attorney.

Dear Sir:

We have your communication of September 25th, calling our attention to Article XXIII, Chapter XXXVIII of the Chicago Code of 1911, entitled "Workshops," being Sections 1390 to 1398, both inclusive.

The question submitted for our consideration is whether every person or corporation desiring to keep, maintain or operate a workshop, as defined in Section 1390 must procure a license therefor or whether only those persons or corporations keeping, maintaining or operating such a workshop in which any person is employed for hire must procure such license.

While the language of Section 1394 of the Code would seem to cover all persons conducting a workshop as defined in Section 1390, we believe that Section 1394 must be read in connection with Section 1393 which limits the requirement for a license to persons conducting such a workshop in which any person is employed for hire. This conclusion is supported by the language of Section 1395, requiring a license to be issued to the applicant after formal application and inspection by

the Commissioner of Health "upon payment to the City Collector of the license fee herein required." There is no license fee required except in Section 1393 above referred to.

We are of the opinion therefore that your construction of the ordinance is correct, that is, that a workshop license is required only in those places where some person is employed for hire.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 30, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

The negotiations for the purchase of the plant of the Chicago Reduction Company came to an end today after the failure of the appraisers to agree upon the price to be paid by the city for same.

Soon after the appointment of Col. Henry A. Allen as the city's representative on the Board of Appraisers, the law department was called upon to advise him in regard to the legal aspects of the contract entered into with the Chicago Reduction Company contemplating the purchase of said plant and also the proper rules for appraisal to be observed by the Board of Appraisers.

The contract states that the purchase price is to be determined by an appraisal to be made by the three appraisers, who should furnish each of the parties to the contract with a transcript of same. We construed this language to mean that the three appraisers must arrive at a conclusion that is unanimous, and that if the appraisers could not agree on a price which they all concurred in, the deal could not be consummated. We also advised the city's appraiser that under the terms of the contract, in case the city for any reason failed to pay the price agreed upon, if such an agreement was reached, within four days after a transcript of the appraisal

was delivered to the representatives of the City of Chicago, or failed to pay such sum on or before the first day of October, 1913, the deal would come to naught; and that in this respect the written contract was in effect one which left it optional with the city authorities to close the transaction, even if the appraisers did agree upon a price.

With respect to the rules of appraisal or manner in which the same should be made, the city's appraiser was informed by the law department that, in determining the value of the real estate, the location of the plant and its accessibility for the purposes for which it was used should be weighed, and that the value of land similarly situated with equal facilities and equally adaptable would furnish a basis for the valuation of the tract in question. We also informed him that it was essential that the plant aside from the real estate should be valued with reference to the fair cash value of same after making due allowance for depreciation, taking into consideration the character of the equipment and its efficiency for future handling of garbage; also that the question of whether the machinery and equipment in use conformed to the most approved method of disposing of garbage and to the ordinances of the city concerning the sanitary reduction of garbage was a matter that must be taken into account.

The city's appraiser was also informed that so far as the value of the plant as a going concern was to be considered, it stood upon a basis peculiarly distinct and entirely different from a business that was in a position to make profits in the future; that the term "going concern," as used in the written agreement, had reference more particularly, in this instance, to the plant's readiness to serve the city and not to the value of the business while in full operation with a prospect of future profits. We called especial attention to the fact that the city, under its contract with the Chicago Reduction Company, furnished the only available source of raw material with which the plant could be worked, and that upon the termination of that contract, no other source of supplies or means of profit were available. As to this feature, the plant was in practically the same position as if it were the plant of a public service corporation whose franchise had ex-

pired, in which event, according to all the authorities, no allowance could properly be made for franchise value.

Acting on the advice of the law department, the city's appraiser accepted the figures of the Chicago Real Estate Board placing a valuation on the real estate on the basis of 75 cents per square foot. This was considered excessive in view of the fact that the land was purchased only a few years ago by this company at about 28 cents per square foot, and that other lands, similarly situated and quite as available in every respect and in some respects better adapted for the purpose, could be procured at much lower figures. To this was added an allowance of 11 per cent. for cost of acquisition and allowance for interest during construction. These figures were considered as highly favorable to the Chicago Reduction Company so far as the real estate was concerned, but were allowed because this value was authorized under the appraisal of the Chicago Real Estate Board. To the value of the real estate the city's appraiser made an allowance for the temporary utility of parts of the plant, the proportionate part of the organization expense, and the scrap and salvage value of other parts of the plant, thereby bringing up the total valuation of the physical property to the sum of \$208,582.

Colonel Allen argued that the market value, or purchase price, in this case is practically the going concern value and that no additional allowance should be made after this has been ascertained. The city's appraiser, therefore fixed as his estimate of a fair purchase price the sum of \$208,582.

Colonel Allen has submitted a report showing in detail the manner in which he arrived at his ultimate figures, and we refer herein only to such totals as we deem necessary to present the facts in a condensed form. It will be seen from that detailed report that he arrived at his ultimate figures by two distinct processes, and that the result was approximately the same in either case.

There was a wide difference between the estimates of the three appraisers. Mr. Almert of H. M. Byllesby & Co., the appraiser for the Chicago Reduction Company, gave as his estimate of the value of the plant for the purpose of this transaction, the sum of \$750,000, although afterwards agreeing to

accept the appraised value arrived at by Mr. Leonard Metcalf, the third appraiser, who fixed the sum of \$475,000 as a proper valuation. The city's appraiser, believing his deductions to be logical and incontrovertible, declined to accept the amount of \$475,000. Therefore, the appraisers were unable to agree and did not submit an appraisal in conformity with the terms of the written agreement. In place of that Messrs. Metcalf and Almert submitted a joint report, and Mr. Almert submitted an additional report in which he undertook to justify his course in accepting the figures of the third appraiser. As above stated, Colonel Allen prepared a report, going into the details of the appraisement, and submitted the same, together with a transcript of the proceedings, to your Honor.

Inasmuch as the board of appraisers failed to come to an agreement, the City Comptroller asked to be advised whether the two documents submitted to him could be regarded as an appraisal within the terms of the contract entered into, and was informed by the law department that such a construction could not be placed upon the reports made to him, and that there was in fact no appraisal.

This conclusion was arrived at after full consideration of the subject and a reference to all the adjudicated cases bearing on the situation. The law was entirely clear on the subject. Under the terms of the agreement no report of two appraisers could be accepted as binding upon either party. Any appraisal to be binding would require the signatures of all three appraisers.

Representatives of the Chicago Reduction Company appeared before the City Comptroller and tendered a deed purporting to have been executed in proper form by the Chicago Reduction Company, a quit-claim deed from John A. Spoor and wife, a new certificate relating to certain proceedings in the Robbins estate which was set forth without proper signatures in the abstract of title, and a release deed of the trustee holding a trust deed on the property, executed by the trustee and the legal holder, and canceled note covered by same, and demanded that the sum of \$492,500 be paid to them in exchange for the documents so tendered. The City Comptroller declined to pay the said sum, and thereupon a notice was de-

livered to him addressed to the Mayor, Commissioner of Public Works and City Comptroller, to the effect that the Chicago Reduction Company would refuse to accept any more garbage for reduction after midnight of September 30, 1913.

This concluded the negotiations concerning the proposed purchase of the plant. We understand that the third appraiser has left the city, and therefore there is no likelihood of any change in the status.

LEON HORNSTEIN,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 7, 1913.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

In your communication of September 18, 1913, is a statement setting forth the details of a proposed building, the first floor of which is to be used for commercial purposes and the upper two stories for tenement purposes, as well as of a theater building of class 4-A adjacent to the commercial and tenement building and separated by a party wall.

Your inquiry is directed to the question as to whether the unobstructed open space from the ground to the sky on each side of the theater building, required by Section 331 of the building code, may be used in connection with and as part of the unoccupied area of the lot above the first story of the proposed tenement house, as required by Section 440 of the building code; that is whether the space required for the theater building and that required for tenement house may overlap each other.

Section 440 of the Revised Building Ordinances provides as follows:

“440. PERCENTAGE OF AREA ALLOWED TO BE COVERED.) No existing tenement house shall hereafter be enlarged nor its lot diminished, nor *other buildings* be placed on its lot, nor a tenement house be moved on a lot on which there is an existing building, so that after

such change a larger proportion of any corner lot or other lot upon which it is situated is covered by buildings, than the following proportions, respectively: No new tenement house alone or *with other buildings* now or hereafter erected, shall occupy above the first story more than eighty-five per centum of the area of a corner lot, provided that in the case of a fireproof building, in which the windows of every habitable room open directly on a street, the portion of the lot covered may be ninety per centum of the area of said lot, subject to the requirement that a ten foot space must be left above the first story opposite the lesser frontage; or more than ninety per centum of the area of such corner lot if such corner lot is bounded on at least three sides by streets or alleys; or more than seventy-five per centum of the area of any other lot, provided that the space occupied by fire escapes, constructed and erected according to law and not more than seventy-five per centum of the area of any other lot, provided that the space occupied by fire escapes, constructed and erected according to law and not more than four feet wide, shall be deemed unoccupied. Provided, however, that in case of a lot, triangular or irregular in shape bounded on two or more sides by a street and having a number of lineal feet street frontage exceeding one-twentieth of the number of square feet in the area of such lot, it shall not be necessary to comply with the conditions of this section as to percentage of lot which may be covered."

The foregoing section does not exclude or except theater buildings erected on the same lot with a tenement building.

It is apparent also that the provision of the building code requiring a certain proportion of the lot occupied by a tenement house to remain open above the first story of the tenement building is to provide sufficient light and air for the proper sanitation of the tenement, while the open space unobstructed from the ground to the sky on each side of the audience room of the theater, required by section 331 referred to, is for the purpose of furnishing sufficient means of exit from the theater building. We can see no reason why one area cannot serve both purposes.

The question of a possible obstruction of the open space by the building of fire escapes does not enter into this case, as none are necessary or proposed according to your com-

munication. When such case shall arise in a similar structure, the question of issuing a permit will have to be determined upon the facts then presented.

Our examination of the plans for the proposed buildings discloses, however, a number of violations of the building code not referred to in your communication. The plans are to erect the buildings referred to upon a plot of ground approximately 150 feet on Lincoln avenue, 125 feet on Giddings street and 150 feet on the alley line.

The first question which arises is, whether the two buildings are to be treated as one proposition, or as two separate buildings upon separate building lots. It is proposed to build the theater building on an "L" shaped piece of land with its entrance on Lincoln avenue adjoining the tenement building and separated therefrom by a party wall, while the audience room of the theater will be at the rear of the tenement and separated therefrom by an open area. If both the tenement and theater building are treated as one proposition, the tenement building must be built of fireproof construction to comply with section 403 of the building code. If they are not treated as one building or in conjunction with one another, then that part of the area of land occupied by the theater building and fronting on Lincoln avenue, which is approximately 24 feet wide and running back to the alley, must be treated as a separate lot for the purposes of computing unoccupied areas and distances between buildings required by the building code.

Treating the buildings as two separate propositions, the parcel of land must be first divided for building purposes into two lots—one approximately 126 feet on Lincoln avenue and 124.6 feet on Giddings street—upon which the tenement house is proposed to be erected; the other 24 feet on Lincoln avenue and 124.6 feet deep, upon which part of the theater building will stand. The tenement house will then be situated on a parcel of land bounded on three sides by public streets and alleys. But all of the latter parcel cannot be treated as a corner lot in view of section 437 of the building code. Under that section, the plot of ground, upon which the tenement building is proposed to be erected, must

be divided into three lots fronting on Giddings street, which is the lesser street frontage and must be taken as the width of the lot. The first lot will be a corner lot situated at the junction of two streets—Lincoln avenue and Giddings street—which will be 50 feet wide and approximately 126 feet deep. The second lot will be an inside lot 24.6 feet wide fronting on Giddings street and extending back approximately 126 feet. The third lot will be a corner lot situated at the junction of Giddings street and a public alley and will be 50 feet wide and extend back approximately 126 feet.

The area which the tenement building will occupy above the first story must then be computed pursuant to section 440 of the Revised Building Ordinances taking each lot separately. Fifteen per cent. of lot No. 1, twenty-five per cent. of lot No. 2 and fifteen per cent. of lot No. 3, last referred to, must remain open and unoccupied above the first story. This is apparently not provided for in the plans submitted.

Besides, the tenement building on lot No. 2 approaches nearer than 10 feet to the rear line of the lot, in violation of section 439 of the Revised Building Ordinances. If the upper two stories of the building, which alone are used for tenement purposes, must be treated as the tenement house in this case, as is contended by the applicant for a permit, the plans nevertheless violate said section 439 in that the commercial building, which is the ground floor and must be treated as another building, is not removed at least 20 feet from the tenement building as is required in this case.

Respectfully submitted,

JOSEPH F. GROSSMAN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 7, 1913.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

Under date of August 21, 1913, this department advised you that there was some conflict of opinion in regard to the

validity of section 117 of the Chicago Code of 1911 and recommended that you withhold the issuance of new permits involving the provisions of that section until the matter could be fully considered by this department and a line of conduct to be observed by both the Building Commissioner and the City Collector could be determined upon.

The question as to whether or not a theater or other place of amusement was entitled to a building permit when it was proposed to construct the same within two hundred feet of a hospital, church or school building and whether such a structure could be built in a residential district without obtaining the frontage consents provided for in said section 117, first arose by reason of the provisions of section 715. The latter section is a part of the building code and prohibits the erection of a building designed or intended to be used as a place of amusement "without first obtaining the written consent of the property owners as required by the city ordinances."

It will be seen that section 715 by this provision undertook to control and regulate the location of buildings designed for places of amusement, because the reference to the city ordinances therein was clearly intended to cover the cases mentioned in section 117. It did not in fact cover the provisions of paragraph (a) of section 117 because that absolutely prohibited amusements of the twenty-one classes mentioned in the Code from being conducted within two hundred feet of a hospital, church or building used exclusively for educational purposes, but nevertheless the evident intent of section 715 was that a permit should not be issued when the entertainment to be conducted in the proposed building was prohibited under section 117 and that none should issue unless frontage consents were secured when they were required for the class of entertainment proposed. In other words, section 117 was practically read into the building code, so that if the conditions were such that a license could not be obtained under section 117 a building permit would also be refused.

This would have been the proper method of handling the subject if the power to control the location of a *place* of

amusement were as broad and comprehensive as the power granted by statute in relation to the entertainment itself.

The continual demand for building permits authorizing the erection of places of amusement in prescribed districts and in residential districts where no frontage consents had been obtained finally resulted in an opinion being rendered in this department to the effect that the municipality could not control the location of *places* of amusement. This is in strict conformity with the law, since the erection of such places of amusement is governed by the fifty-eighth clause of the section containing the grant of powers to the City Council, which reads as follows:

“Fifty-eighth: To regulate places of amusement.”

In numerous decisions of the Supreme Court handed down in the last few years it has been held that the power to regulate does not include the power to control the location, and consequently it may be said to be well settled that any ordinance which undertakes to control the location of a *place* of amusement under the limited power to regulate same will be held invalid.

Therefore it was proper to advise you that the Building Department did not have the right to refuse a permit under section 715 of the Code where it was properly applied for even though the conduct of an entertainment in the place of amusement authorized to be erected under such a permit was contrary to section 117 of the Code. Since the opinion of this department mentioned above was given the impression has prevailed that all bars are down and that any person applying for same would have the right not only to construct a *place* of amusement but that he would be entitled to a license after the same is completed. This is a mistaken idea and it is to correct this impression that the present opinion is written.

After a place of amusement is built the regulation of the entertainment to be given therein is a matter which comes more fully under the control of the municipality than the erection of a building or structure. The power granted the city over such entertainments is as follows:

“Forty-first: To license, tax, regulate, suppress and

prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals and other exhibitions, shows and amusements, and to revoke such license at pleasure.”

It will be observed that the above clause gives the city power to suppress and prohibit theatricals and other exhibitions, shows and amusements. Where power to suppress and prohibit is given it amounts to the delegation of the complete police power of the state over the subject in question, because it has been held repeatedly that where a municipality is granted such complete authority over an occupation it may impose such conditions as it sees fit.

Launder v. City of Chicago, 111 Ill. 291.

Schwuchow v. City of Chicago, 68 Ill. 444.

Goodrich v. Busse, 247 Ill. 366.

It may be doubted whether, in spite of the sweeping language used by the statute, the police power is sufficient to authorize the suppression or prohibition of a theater or other amusement enterprise that is legitimate, but whether that is the case or not, it is clear that whatever the police power of the state may be the whole of same may also be exercised by the municipality.

Hence, it follows that, although the city would be bound to issue a permit when it is applied for under proper conditions for a place of amusement even if the entertainment to be given would not be permitted under section 117, nevertheless, section 117 being a valid ordinance and within the powers of the City Council, it would be necessary to refuse a license under that section after the building is erected in case section 117 is enforced.

The case of *United Theaters Company v. Busse*, 162 Ill. App. 314, in which the refusal of the Mayor to issue a license because he did not regard the place as fit and proper owing to its proximity to a church, does not in any way alter the status. That was a case where the city council had not by ordinance expressly prohibited the erection of a theater at such a place, and the words “fit and proper” were held not to relate to the physical location of the place with reference to a church; consequently that decision cannot be regarded as holding that an ordinance to that effect would be invalid.

Since it is clear that a person may obtain a permit authorizing him to erect a building which perhaps he may not be able to use as he intends to use it on account of the provisions of section 117, we believe it would be unjust to issue building permits for amusement enterprises without calling particular attention to this state of affairs; and we therefore recommend that whenever a building permit for the construction of a place of amusement is issued the same should have written or stamped thereon some notice to the effect that a license may be refused if the building is to be used contrary to the provisions of section 117 of the Code. Such notice may be in the following language:

“Notice: The issuance of this building permit is not to be construed as giving authority to any person, firm or corporation to produce, offer, present or carry on any entertainment for which a license is required under the ordinances of the City of Chicago, and such license will be refused in case it is proposed to present an entertainment in the building hereby authorized to be erected contrary to the provisions of the ordinances of said city in relation to amusements.”

We are forwarding a copy of this opinion to the Mayor and the City Collector, in order that they may be fully advised in the premises.

We believe that with the notice suggested above, parties who apply for building permits will be informed as to the conditions that confront them and will not be in a position to complain if they take the chance of obtaining a license when they construct a building designed for an entertainment that is not permitted in any given locality.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 10, 1913.

H. D. SHOUD, Esq., The Telephone Users Ass'n., 29 S. La Salle St., Chicago.

Dear Sir:

In reply to your communication of recent date, requesting an opinion as to whether or not Messrs. Rankin & White were subscribers or agents of the Chicago Telephone Company under their old contract, I submit the following:

The Chicago Telephone Company places telephones in drug stores and makes contracts with the owners thereof which provide that the owner will furnish what is necessary in the way of space, service, etc., in connection with the installation and maintenance of a public telephone, and the Company will pay a certain compensation therefor in the way of a percentage of the receipts above a given amount. The contract provides that the same may be terminated upon ten days' notice in the event that receipts for local messages at five cents each during a period of about sixty days shall fail to average three per day per line. The druggist does not become a lessee, subscriber or patron of the Telephone Company under this contract, for he is privileged to use the telephone or not, and if he does he is required to pay the same rate exacted from every other user of that telephone. There is nothing in the Chicago Telephone ordinance which in any way prohibits such an arrangement.

You state that a guarantee is required under this contract, but upon an examination of the form of such contract, we find that the agent does not guarantee to pay anything to the Chicago Telephone Company. Of course, the contract provides that the Chicago Telephone Company may cancel the contract if a specified amount of business is not obtained on such telephones, but this is a matter of regulation over which the Company has complete charge.

Respectfully yours,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 14, 1913.

HON. JOHN McWEENY, General Superintendent of Police.

Dear Sir:

In your communication of September 4th you enclose a letter from Capt. P. J. Gibbons, Commanding First District, stating that a certain window display of photo postal cards on Madison street just east of Clark street, attracts such a number of pedestrians as to congest the sidewalk.

We gather from the contents of Capt. Gibbons' letter that the pictures displayed are neither indecent nor obscene nor otherwise objectionable and are part of the merchandise of the proprietor exhibited for sale; but the question you ask is whether, by reason of the congestion on the sidewalk caused by the display, the proprietor can be compelled to remove the pictures from his window or penalized for his failure to do so under the existing ordinances.

Section 2045 of The Chicago Code of 1911, reads as follows:

"2045. GAMES AND PERFORMANCES IN STREETS OR ON PREMISES ABUTTING ON STREETS.) No person shall engage in any game, sport, amusement, performance or exhibition, or exhibit any machine or show or any animal, or indulge in any acrobatic or gymnastic feats, on any street, public way or sidewalk in the city, nor shall any person give or cause to be given any performance, show or exhibition of any kind or nature whatsoever in any show window or in or on any premises immediately abutting upon any street, public way or sidewalk in the city, which is designed or intended to or which as a matter of fact does collect, attract or cause to be collected or attracted a sufficient number of persons to interfere with the passage of the public along the street, public way or sidewalk or upon which such show window or premises abut. Any person violating any of the provisions of this section shall be fined not less than five dollars nor more than one hundred dollars for each offense. In any case where any show, performance or exhibition of any kind or nature whatsoever is being held, carried on or given in any show window or in or on any premises abutting upon any street, sidewalk or public way in the city, which is designed or calculated to attract the attention of pedestrians or persons passing such show window or premises, and which such show per-

formance or exhibition results in the collection or attraction of a sufficient number of persons on the street, sidewalk or public way upon which such show window or premises abut to interfere with the passage of the public along such street, public way or sidewalk, any member of the department of police shall have the power and it shall be his duty to enter such premises and cause such show, performance or exhibition to be discontinued forthwith, and any performer, figure, apparatus, or other thing of any kind or nature whatsoever, engaged in or used in or about such show, performance or exhibition, removed from such show window or premises forthwith. Any person in charge, possession or control of any such show, performance or exhibition, or in charge, possession or control of any show window or premises in or upon which such show, performance or exhibition is being given or conducted as aforesaid so as to collect or attract a crowd sufficient to interfere with the free passage of the public along any street, sidewalk or public way as aforesaid, and who shall neglect or refuse to discontinue such show, performance or exhibition, or to remove any performer or any apparatus or thing used therein, when requested so to do by any member of the department of police, or who shall refuse to allow any member of the department of police to remove from such window or premises any such performer, apparatus or thing, or resists such removal by any member of the department of police, shall be fined not less than five dollars nor more than one hundred dollars for each offense."

The foregoing section of the ordinances must be read in the light of the power of the city to regulate and control such performances, shows or exhibitions.

The 41st clause of section 1, Article V of the Cities and Villages Act gives the city council of cities the power to "license, tax, regulate, suppress and prohibit * * * theatrical and other exhibitions, shows and amusements." We are of the opinion that a window display is not such an exhibition or show as was contemplated by the legislature in the foregoing provision.

The city has, however, the power to declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist.

It is well settled that municipalities cannot, under this

power, make that a nuisance which is clearly not a nuisance at common law.

Laugel v. Bushnell, 197 Ill. 20.

Carthage v. Munsell, 203 Ill. 474.

In a celebrated English case the exhibition of an object in a window abutting a street which drew crowds to the shop, was held to be an indictable nuisance. (*Rex v. Carlisle*, 6 Carr. & P. 636.)

In the case cited, the defendant, a bookseller in Fleet street, London, was distrained for non-payment of taxes levied to support the church. "After this he took out the frames of his first floor windows and put in one of them an effigy of a bishop of the established church, under which was written 'Spiritual Broker' and in the other window the figure of a man in ordinary dress, and under his the words, 'Temporal Broker.' These figures attracted crowds of persons to gaze at them, and the consequence was, that the trade of the neighboring shops was much injured, and the footpaths were so obstructed that persons were obliged to walk in the carriage way. The defendant afterwards added a third figure, that of the devil, the arm of the figure of the bishop being tucked into that of the devil." The case was tried before a jury and the judge in summing up said (p. 647):

"The gravaman of a charge like this is not whether these effigies were libelous, but whether the defendant, by the exhibition of them at his windows, caused the footway of Fleet street to be obstructed, so that the public could not pass as they ought to do; X.44.

There is no doubt that a tradesman may expose his wares for sale; but he must do it in such a way as not, by so doing, to cause obstruction in the public streets."

Whether the principle applied in the English case would be extended by our own courts to a case where the exhibition is of the wares actually offered for sale is at least doubtful. We have been unable to find a single case where the precise question was involved, and indeed, our search has not disclosed another case which went as far as that cited, although it has frequently been cited by the courts and text book writers.

See:

3 Dillon on Mun. Corps., Sec. 1131 (Note).

Wood on Nuisances, Sec. 264.

Joyce on Nuisances, Sec. 227.

Peo. v. Cunningham, 1 Den. (N. Y.) 532.

Davis v. Mayor, 14 N. Y. 525.

Davis v. Bangor, 42 Me. 528.

It seems a somewhat extreme proposition to say that, where a man confines himself to the display of his own wares in his own show window, and such display does not offend against any principle of public morality or public policy, such a man so acting should be liable to a penalty merely because he is more than ordinarily successful in attracting the notice of passersby. In such a case, if a crowd collects to such an extent as to seriously interfere with traffic, it may be urged with much force that the proper and only remedy is to cause the crowd to move on.

Answering the specific question which you ask, we will state that in our opinion you have not the right under section 205, or under any other section of the municipal code, to proceed against this man for merely exhibiting in his show window the wares which he has for sale and which are not in any way objectionable.

Whether the council could, under its power to declare certain conditions to constitute a nuisance, declare an exhibition of a man's wares in the window of his store to be a nuisance merely because it attracted a crowd on the sidewalk; and whether, if the council had such a power, it would be good policy for it to exercise the power, are questions regarding which we do not feel called upon to here express an opinion.

We may, however, go so far as to say that we seriously doubt if the council could be induced to pass such an ordinance.

Respectfully submitted,

WM. DILLON,

Assistant Corporation Counsel.

JOSEPH GROSSMAN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 15, 1913.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

On October 6, 1913, the city council passed an ordinance authorizing the issuance of warrants in anticipation of the school building tax levy by the City of Chicago for the payment of the ordinary and necessary expenses chargeable against them for the year 1913, the funds for that purpose having been exhausted. The ordinance was in the usual form, and in the absence of any question as to the present law on the subject, there would be no occasion for passing on the legality of issuing same.

Owing to the fact that the law authorizing the issuance of anticipation warrants was revised by the legislature this year, you ask for an opinion from this department as to the propriety of issuing same under said ordinance.

The Act in question is identical with the old Act in all but the following particulars: in the two places in which there is an enumeration of municipal corporations authorized to issue such warrants, the words "school districts" are left out; at another place provision is made for the issuance of such warrants for building purposes; and at still another place the words limiting the interest on same to those which are not paid within thirty days after issuance are taken out, so that interest may be paid on all; and near the close of the Act is added the following sentence: "The application of this Act, however, shall not relate to school districts."

We are informed that the Act was revised at the request of the Board of Education and that the purpose was to enable the Board of Education to anticipate the taxes for building purposes and to enable them to issue interest bearing warrants for less than thirty days. The question has arisen, however, whether the legislature, in eliminating the words "school districts" and in putting in the sentence reciting that the Act shall not relate to school districts, closes the door to the issuance of such anticipation warrants by the Chicago Board of Education.

The view we take of the situation is that in case the City of Chicago is a "school district" under the law, it is

precluded from paying interest on warrants of this kind; although in that event it would have the right under section 117 of the School Act to issue such warrants provided they do not bear interest.

We have examined the School Act closely for the purpose of determining whether the City of Chicago is a school district. We find only one thing that inferentially indicates that it is to be regarded as such.

Section 103 of the school law reads as follows:

“In all school districts having a population of fewer than 1,000 inhabitants, * * *”

Section 123 of the same act reads:

“In all school districts having a population of not fewer than 1,000 and not more than 100,000 inhabitants,
* * *”

From the above it might be inferred that since there is a classification of school districts of less than 1,000, and another of not less than 1,000 “and not more than 100,000” that it necessarily follows that where there are more than 100,000 in a city it is to be regarded as a school district. But we find that when the Act takes up school matters in cities of 100,000 or more it simply speaks of them as “cities having a population exceeding 100,000 inhabitants,” and does not speak of same as a school district. Moreover, they are under a separate sub-head, and therefore it cannot be said that section 124, which provides that cities and villages shall remain parts of school townships, applies to such large cities.

Pursuing the inquiry along this line, we find that the schools of this city are upon a different basis than those outside of the city. In the case of all school districts outside of this city, the school districts themselves have the power to levy taxes, while in this city the levy is made by the City Council. Aside from this, the moneys raised by taxation are held by the City Treasurer and cannot be paid out except on warrants countersigned by the Mayor and City Comptroller, the Board of Education has no power to borrow money except with the concurrence of the City Council, the title to school lands is vested in the City in trust for the schools, and the power to sell land must also be exercised by the City Council. It

was held in the case of *Brennan v. The People*, 176 Ill. 620, that the Board of Education is a department of the city government.

Thus, in such vital matters as affect the raising of revenue, the purchase, holding and sale of real estate, and the expenditure of money, the City acts for the Board of Education, and is in fact the agency which is handling the fiscal affairs relating to the public schools within its borders. If the territory within the boundaries of the city were to be regarded as a school district, then endless difficulty would arise in construing the School Act, because the Board of Education is not a municipal corporation and does not have the power exercised by directors and board of education in other school districts. Even in the section which authorizes the raising of revenue, the distinction seems to be drawn between school districts and such a city as Chicago, since the following words are used:

“* * * the directors of such district and the authorities of such village or city, shall be authorized to levy a tax annually upon all the taxable property of the district, village or city. * * *”

We are, therefore, of the opinion that while the elimination of the school district from the provisions of the Act in question was not wise in view of the language of the School Act, nevertheless it is plain that the City has the right to issue such anticipation warrants for and on behalf of the Board of Education, to be used in defraying the usual and ordinary expenses of the schools.

Very respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 20, 1913.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

You have requested an opinion from this department on the necessity of provision being made in the annual appropriation ordinance for the disposition of that portion of the funds derived from the vehicle tax license which is to be expended in the discretion of the Commissioner of Public Works for the repair of the streets on which the traffic is heavy.

Under the ordinance fixing the license fee and specifying the manner in which the same shall be used, there is a provision requiring 15 per cent. of the total revenues obtained therefrom to be expended in the discretion of the Commissioner of Public Works for the repair of streets upon which there is unusually heavy traffic. No specific appropriation was made for this purpose in the annual appropriation bill, and the question now arises whether the Commissioner of Public Works has the right to expend this money in accordance with the general ordinance on the subject without such specific appropriation.

There are statutory requirements under which it is proper to take a certain proportion of the funds received and devote them to the purpose for which they are intended to be used. For instance, certain sums may be transferred to the police and other pension funds without any action whatever on the part of the City Council. But in all cases of this kind the statute is specific and must be followed regardless of whether the City Council takes cognizance of same or not.

In the present instance, there is no such statutory provision. The clause of the section authorizing the collection of such a license fee states that the same shall be kept as a separate fund and used only for paying the cost and expense of street or alley improvement or repair. To this extent the statute is mandatory and moneys can not be diverted from such fund to any other use, but as to the manner of disposing of same that is left to the discretion of the City Council.

The City Council has seen fit to specify in a general ordinance that the fund shall be divided in a certain way. The paragraphs relating thereto are as follows:

“All revenues derived from such license fee shall be kept as a separate fund and used for paying the cost and expenses of street or alley improvement or repair.

The city collector shall keep a separate account by wards showing the amount of revenue obtained from each ward in which any vehicle not drawn by animal power is kept when not in use, and in which any animal or animals are kept drawing any wagon or vehicle for which a license is procured under the provisions of this article.

Fifteen per cent. of the total revenues thus obtained shall be set aside, to be expended in the discretion of the commissioner of public works and under his direction, for the repair of such streets upon which there is an unusually heavy amount of traffic.

So much of the remaining eighty-five per cent. of the revenues obtained from each ward, as, in the discretion of the commissioner of public works, may be needed for immediate use, shall be expended under the direction of said commissioner for the repair of streets and alleys in such ward, and the balance thereof shall remain to the credit of such ward account to be used as occasion requires.”

It will be seen from an examination of the above that no greater discretion is vested in the Commissioner of Public Works with reference to the expenditure of the 15 per cent. than of the 85 per cent. He has the authority to designate the streets and alleys upon which the 15 per cent. shall be expended and the kind of repairs to be made. He has like authority to designate the streets and alleys in the various wards where repairs should be made and the kind of work that should be done. It would be inconsistent, therefore, to say that he must follow the appropriation ordinance strictly with regard to the expenditure of the 85 per cent., but need not be guided by its provisions in the expenditure of the 15 per cent.

The City Council in its appropriation ordinance for the current year directed that a certain amount, somewhere in the neighborhood of \$640,000.00, should be spent by him, and he is the one who is to determine the application of the respective percentages using the 85 per cent. of same for one purpose and 15 per cent. for another purpose.

We do not understand that this appropriation was in-

tended to cover only 85 per cent. of the receipts. Our construction of same is that the City Council assumed that the total revenues would amount to \$640,000.00, and appropriated accordingly. If it should happen that the receipts from this source will be greater than the amount appropriated, that fact does not warrant the presumption that the City Council intended to appropriate only for the 85 per cent.

The statutory provision relating to appropriations requires that the City Council shall appropriate such sum or sums of money "as may be deemed necessary to defray all necessary expenses and liabilities." The interpretation put upon this clause by this department has been such that even where bonds were issued for a specific purpose the expenditure of the money realized on the same was authorized only when an appropriation was made.

We find no authority in this State which specifically holds that this is necessary, but the general trend of all authorities both in this and other jurisdictions, is to the effect that heads of departments must strictly limit their expenditures to the appropriations made by the City Council regardless of the source from which the money comes.

This line of conduct having been established and followed for years, we are unable to give assent to a departure therefrom when the authority for such departure is not explicitly set forth in the general ordinance providing for the disposition of the fund in question.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 22, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your communication of recent date, asking for advice as to the exact status of the law pertaining to the prohibition of dancing in restaurants, has been referred to me for reply.

Section 1 of the ordinance, passed by the City Council July 30, 1913, (Council Proceedings, p. 1989), is as follows:

“No person, firm or corporation, either as owner, lessee, manager, officer or agent of a restaurant or public place of refreshment, whether an admission fee is charged or not, shall give, conduct, produce, present or offer any cabaret, or other similar entertainment therein, wherein any person shall appear before the audience clad in tights, or wherein any entertainers shall perform their acts by mingling with the audience or traveling about among them.”

Section 109 of the Chicago Code of 1911 is in part as follows:

“109.. MAYOR MAY REFUSE A LICENSE—WHEN.) If the place at which it is desired to offer any of the foregoing entertainments be not a fit or proper place and not constructed, maintained, operated or conducted in accordance with the provisions of the ordinances of the city governing and controlling said places, or if the entertainment desired to be produced or offered be of an immoral or dangerous character, or if the person making application for a license be not of a good moral character, * * * the mayor may refuse to approve such application and no license shall be issued by the city clerk, except upon the approval of the mayor.”

The first ordinance quoted prohibits the presenting of any cabaret, or other similar entertainment, wherein any person shall appear before the audience clad in tights, or wherein any entertainers shall perform their acts by mingling with the audience or traveling about among the same. It may be seen from the above that such entertainment is prohibited at any public place including licensed dance halls if refreshments are served.

There is no ordinance, however, which prohibits the serving of refreshments at dance halls and, therefore, if a place were to be licensed for a dance hall wherein refreshments were served, dancing alone therein would not constitute a violation of the ordinance.

By the provisions of section 109 above quoted you may refuse to approve an application for a dance hall license only in case it appears, first, that the place at which it is desired to conduct the same be not a fit or proper place; second,

that such place is not constructed, maintained, operated or *conducted* in accordance with the city ordinances regulating the same; third, that the entertainments therein be of an immoral or dangerous character; fourth, or if the applicant be not of a good moral character.

Respectfully submitted,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 23, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Some time ago you transmitted to this department a letter from the President of the Board of Education in reference to certain changes on "existing" school buildings demanded by the Building Department. Some of these demands related to assembly halls and fire escapes, and the right of the Building Commissioner to require the alterations was questioned by the Board of Education.

The letter referred to was later supplemented by another from the Secretary of the Board, in which the latter stated that as to all matters except the demands concerning assembly halls and fire escapes the Board had complied with the notices served on it.

About the same time that the letter was received from you, the Commissioner of Buildings requested advice concerning the same propositions, and an opinion was given to him which covered the law on the main point at issue. But, owing to the fact that the special committee which was drafting the Fire Prevention and Public Safety Ordinance had under consideration the very questions which were in dispute, the final disposition of some of these matters was delayed. This may have resulted in deferring the construction of some of those things which the Building Commissioner has a right to require, and we therefore again bring up the subject in order that the status under the present ordinances may be de-

fined and that all requirements which have not been met may be complied with.

ASSEMBLY HALLS.

With reference to the disputed matters in regard to assembly halls we submit the following:

The Commissioner of Buildings notified the Board of Education to close the assembly halls in seventeen schools or to reduce the seating capacity in same so as to comply with the provisions of Section 496 of The Chicago Code of 1911, which prescribes the limitations as to seating capacity and floor levels of such assembly halls in buildings of Class VIII.

It was contended on behalf of the Board of Education that the provisions of Section 496 did not apply to school buildings in existence at the time of the passage of the ordinance, because there is nothing in the section indicating that it should take effect retroactively, while on the other hand there are other sections of the Code which define specifically what provisions of the building ordinances shall be construed as retroactive.

There is great force in this contention, which is in harmony with opinions rendered from time to time on similar points by this department. Article XI of the Chapter on Buildings relates to buildings of Class VIII. The first section defines what buildings of Class VIII are. The next section states that all buildings of this class must conform to the general provisions of the Chapter and also to the special provisions of the Article. Then follows Section 493, the first paragraph of which reads as follows:

“493. CONSTRUCTION OF.) (a) All buildings hereafter erected and used or intended to be used wholly for the purposes of Class VIII shall be constructed in accordance with the provisions of this Chapter relating to Class VIII; and existing school buildings shall comply with the provisions of Class VIII with reference to stairs, exits and fire escapes.”

This provision cannot be construed otherwise than that “existing” buildings are exempt from the remaining provisions of Article XI, aside from those relating to stairs, exits and fire escapes.

This view is also borne out by the interpretation which this department has placed on Section 514 (a) and (b) of the Code, relating to buildings in general. Said section reads in part as follows:

“514. ALTERATIONS OF EXISTING BUILDINGS.) (a) In construing the several sections of this Chapter, said sections shall not be construed as requiring alterations in the construction or equipment of buildings or structures in existence at the time of the passage of this Chapter, except where specifically provided, unless such buildings shall not have sufficient or adequate means of egress therefrom or ingress thereto, by reason of insufficient or inadequate stairways or stairways improperly located or insufficient or inadequate elevators or elevator equipment, doors, fire escapes, windows or other means of egress or ingress and except also in sections which are herein made retroactive.

(b) Whenever an Inspector of Buildings shall make a report to the Commissioner of Buildings that any such building has inadequate or insufficient means of egress therefrom or ingress thereto, as aforesaid, the Commissioner of Buildings shall notify the owner, agent, or person in possession, charge or control of such building of such fact and direct him forthwith to make such alterations and changes in the construction or equipment of such building comply with the requirements of this Chapter.”

We maintain that under Section 514 the Building Commissioner has the right to determine whether the assembly hall in an existing school building has sufficient and adequate means of egress therefrom and ingress thereto, and if it has not, then to determine what is necessary in order to make it safe in this respect. So that, while he cannot compel a reduction of the seating capacity, he has not lost control of the situation and can compel the installation of stairways, fire escapes, exits, aisles, hand rails and other safety appliances which may be necessary to bring the hall in question into strict compliance with the ordinances. The Fire Prevention Ordinance does not materially alter this status.

We are therefore of the opinion that, so far as reducing the capacity or closing the assembly halls in question is concerned, the Building Commissioner is without power if the

Board of Education lives up to all the other requirements of the ordinance with regard to the means of ingress and egress therefrom.

FIRE ESCAPES.

Passing now to the subject of Fire Escapes, we find that demand was made for additional fire escapes on fifteen school buildings. Among these were seven buildings which were only three stories in height, and as to these it was pointed out that the ordinances require fire escapes only on buildings four or more stories in height.

A large part of the difficulty that has arisen on this point could have been obviated if the demand had been fully understood. In most of the three-story buildings where the notices called for fire escapes the buildings did not comply with the provisions of Section 497 relating to stairways.

It must be borne in mind that the ordinance in respect to the width and number of stairs is retroactive, and in case an existing building does not comply it must be altered. It has been the practice in such cases to require either additional stairways or their equivalent in fire escapes.

The expense of building the stairways would have been so great in some cases that it was a distinct advantage to the Board when the Commissioner of Buildings specified fire escapes instead of additional stairways to make up the deficiency. This applied to four of the buildings in question, and since the matter is thus explained, the demand of the Commissioner appears reasonable and ought to be complied with if it has not already been done.

So far as the notices to place fire escapes on four story buildings are concerned, the Board of Education expressed a willingness to comply, and we presume these have been equipped with same.

Among the notices, however, were three which were open to some doubt. These related to the Lloyd Branch, Goudy Branch and Field Schools. These are all three-story buildings.

The first of these (Lloyd Branch) is a frame building. There is no distinction made in the ordinance between a frame building and any other building of ordinary construction. Consequently we can not find a specific requirement for a

fire escape on a frame building unless it is at least four stories high.

The ordinances give some discretionary power to the Commissioner of Buildings under Sections 201 and 202, but it cannot be said that he has a right to demand the installation of a fire escape on a building three stories high where the Code requires them only on buildings four or more stories in height. Hence, even in the case of the frame building, there is no provision of the Code which can be invoked to compel the installation of a fire escape. This necessarily applies also to the other two buildings.

A part of the letter that you turned over to us contained a reference to the requirements of the Smoke Prevention Department in regard to the height of smoke stacks on school buildings. We gather from your letter, however, that you do not ask for any opinion on this point, because no legal question has arisen concerning it and there is nothing in the Code which prevents the exercise of the discretion complained of. If the discretion is too wide it can only be taken away by the passage of a new ordinance.

The letter from the President of the Board of Education is returned herewith.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 27, 1913.

HON. EUGENE BLOCK, Chairman, Local Transportation Committee.

Dear Sir:

On October 20, 1913, the Subcommittee on Surface Merger of the Committee on Local Transportation adopted the following resolution:

“That the Corporation Counsel be instructed to draft an ordinance for operating unification of the surface street railway companies along the agreement reached

at the meetings of the Subcommittee; and, furthermore, that the Board of Supervising Engineers be asked to assist in drafting the said ordinance."

Therefore, on October 10, 1913, at a meeting of the Subcommittee the following resolution had been adopted:

"That the Corporation Counsel, working with the Board of Supervising Engineers, be requested to draw up an ordinance on the lines now being worked out by the Subcommittee and the Board of Supervising Engineers and the different heads of departments."

On October 21, 1913, you submitted to this department a "memorandum for preparation of the ordinance providing for unification of the surface companies * * *, and copy of the report of the Board of Supervising Engineers * * * giving recommendations upon the plan proposed October 4, 1913."

Accompanying your communication was a report of the Board of Supervising Engineers, signed by its Chairman, consisting of twenty typewritten pages, which report embodies the findings, suggestions and criticisms of the Board upon a proposition submitted by the representatives of the surface lines to your Honorable Body October 4, 1913, the latter communication being a printed document of two pages containing twelve propositions.

On October 25, 1913, your Committee further asked for an opinion as to whether the special electrolysis provisions to be included in this ordinance would nullify the provisions in the ordinance of July 15, 1912, covering electrolysis and whether the connection of the traction companies' utilities with city pipes or pipes of other corporations was permissible under the police power and whether such connection would subject the city to damages. In the last communication you also asked for the preparation of a clause removing the transfer restrictions of the 1907 and subsequent ordinances and providing for a general universal transfer in the downtown district.

The draft of the ordinance requested by you, and which we submit herewith, has been prepared by this department in conjunction with the city's representative and engineer on the Board of Supervising Engineers, yourself and counsel repre-

senting the surface traction companies. The subject matter of the ordinance and the questions of policy involved therein were, as we assume for the purposes of this opinion, fully discussed and determined upon by your sub-committee in conjunction with the various heads of departments of the City, the Board of Supervising Engineers, Chicago Traction, the representatives of the surface lines and experts upon the various technical matters under consideration. In our draft of the ordinance, therefore, we have followed with practically no deviation the recommendations of the Board of Supervising Engineers as submitted to your sub-committee in so far as such recommendations were adopted by your sub-committee, and as shown in your communication to this department of October 21, 1913, and later communications. While we have made no substantial or material departure in our draft of the ordinance from the recommendations of the Board ultimately adopted by your sub-committee, we deem it proper to call your attention to the effect which certain provisions of this ordinance, if passed by the City Council, will have upon various matters which have heretofore been called to the attention of this department, and concerning certain of which matters this department has expressed its view of the law relative to the same through written opinions and otherwise. These questions, and the effect of this ordinance upon them, are briefly:

(1) The provisions of section 8 of the proposed ordinance will abrogate with respect to the surface Traction Companies only the general ordinance contained in The Municipal Code designed to protect underground utilities from electrolysis, and which is now in litigation.

Bozart v. Campbell, 48 Rob. (La.) 411.

Rushenberg v. So. El. Ry. Co., 161 Mo. 70.

Campbell v. St. Louis & Suburban Ry. Co., 175 Mo. 171.

(2) All questions of the liability of the surface traction companies with respect to certain disputed matters which have been at issue between the companies and the city with relation to the proper proportion of the cost of street cleaning will be fixed and determined by the terms of section 7

of the proposed ordinance, so far as these or similar questions may arise after the taking effect of the ordinance. We are not, however, of the opinion that the passage of this ordinance will affect the legal aspect of disputes upon this subject which are undetermined up to the time of the passage of the ordinance.

(3) Section 6 of the proposed ordinance will modify certain sections of The Municipal Code concerning the laying of rails in newly paved or repaved streets.

(4) Section 3 of the proposed ordinance sanctions and confirms the basis of accounting heretofore in effect under the traction ordinances, and will have the effect of settling, in accordance with principles and methods heretofore adopted by the Board of Supervising Engineers, certain questions with reference to the renewal fund and payment of fines.

This department has heretofore held that the present method of accounting with reference to the renewal fund is technically incorrect from the standpoint of the 1907 ordinances, and has held that the method of accounting with respect to the payment of fines imposed upon the companies for violation of city ordinances is likewise incorrect. These questions (if such arise in the future) will be definitely settled and confirmed by the terms of section 3 of the proposed ordinance in a manner contrary to that heretofore pointed out by this department, and in view of the corroboration of the Board of Supervising Engineers' position by Council action, any compulsory adjustment of past differences through the courts will be rendered improbable of success. To put the situation in other words, the passage of the provisions of Section 3 will constitute an estoppel against the city to claim that the basis of accounting heretofore adopted by the Board of Supervising Engineers and urged by the companies with regard to all matters in dispute under the traction ordinances is incorrect, because of the fact that this ordinance substantially in terms confirms and ratifies such previous methods of accounting. This question, however, resolves itself into one of policy, as to waiver, for the City Council to determine.

(5) All litigation pending against the companies for previous violations of ordinances as in our opinion will be

affected in a practical way, and their successful prosecution and the collection of fines and penalties thereby rendered doubtful. These prosecutions are for violations of the Electrolysis ordinance, the Overcrowding ordinance, the Car Heating and Ventilating ordinance, and the Universal Transfer ordinance. We say that the result of these suits will practically be involved for the reason that, while in the strict legal sense the passage of the ordinance will not relieve the companies from past violations, and the ordinance excepts pending litigation, yet it will be difficult to convince any court or jury that these companies should be fined for violations when under the present ordinance they would not be guilty of such violations.

(6) Section 14 by its provisions prohibits the issuance of transfer or acceptance of the same for rides beyond the city limits or from points without the city limits to points within the city limits, it being the purpose of this section to confine the operation and benefits of the five-cent fare to points within the city limits.

Certain citizens of Oak Park, River Forest and Maywood have heretofore instituted suits at law to compel the Chicago Railways Company, as successor in interest to other companies, to transport passengers from the municipalities where such citizens reside to the downtown district in the City of Chicago and from downtown to the villages for five cents.

I am of the opinion that the provision of this ordinance will have the effect of defeating all such suits and making it impossible for the surface traction companies to interchange transfers with other companies whose lines are without the city limits. This will not apply, however, to the present ordinance arrangement by which the Chicago Railways Company transports passengers from the city to the neighborhood of the Western Electric Company's factory in the Town of Cicero, and from such point into the city, nor to the Chicago City Railway Company's line built to 119th street.

The Companies have stipulated in clause (b) of Section 8 to bear any damages caused by connecting up their utilities

with any electrically positive pipes or wires in the streets, so this question is eliminated.

Yours respectfully,
JOHN W. BECKWITH,
First Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

OCTOBER 27, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

We are in receipt of a communication from your Secretary, Mr. Fitzmorris, stating that you would like an opinion in respect to the right of the city to compel the applicant in the above mentioned application not to open an entrance to the saloon in question from La Salle avenue.

From a recent report of an investigator from this office it appears that the proposed saloon has a diagonal entrance on the southwest corner of North avenue and La Salle avenue, and also that there is a door leading into the saloon on La Salle avenue about 30 feet south of North avenue.

It appears that La Salle avenue is a residence street north of Chicago avenue and that no saloons have been located thereon for a great many years and that there are many churches and fine residences thereon and that it is used by a large number of women and children in going to and from Lincoln Park.

In the case of *Harrison v. People*, 222 Ill. 150, our Supreme Court laid down the doctrine that there is vested in the licensing authorities a discretionary power which may be reasonably exercised in the granting or refusing to issue a saloon license.

We are of the opinion that a refusal to grant the license applied for, except on condition that there shall be no entrance to the saloon opening on La Salle avenue, would be a reason-

able and valid exercise of the discretion lodged in you in regard to the granting of saloon licenses.

Yours respectfully,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 27, 1913.

M. FERRY, Esq., City Telephone Supervisor.

Dear Sir:

We are in receipt of your communication of October 1st, in regard to the service furnished by the Chicago Musolaphone Company to its customers over the lines of the Illinois Telephone and Telegraph Company, for which service the former company makes a charge to its customers of \$3 a week.

You ask whether this charge is illegal in view of the clause in Section 6 of the Illinois Telephone and Telegraph Company ordinance of February 20, 1899, which, after fixing the maximum charges that the company may make to its subscribers for different kinds of service, provides that the company "shall make no further or additional charge for any improvements or device used for the benefit of the service. * * *"

As we understand your communication, the Telephone Company does not furnish the service referred to and makes no charge for or in connection therewith. The service appears to be furnished by the Chicago Musolaphone Company to persons who desire the service and voluntarily contract with the last mentioned company to pay it for furnishing the same.

We are of the opinion that no violation of the clause of the ordinance referred to results from the making and collecting of the charge by the Chicago Musolaphone Company.

You also ask whether the furnishing of the service referred to by the Chicago Musolaphone Company on Sunday (as distinguished from week-days) is illegal.

We are of the opinion that the right to furnish the service is the same on Sunday as on the other days of the week.

Yours truly,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 27, 1913.

HON. JOHN D. RILEY, Superintendent of Maps, City of Chicago.

Dear Sir:

In your communication of September 25, 1913, you ask to be advised whether you are following the proper method in verification reports on frontage consent petitions for saloons, street railways, garages, etc., which is as follows:

FIRST: In cases where the title appears of record in joint tenants and only one of the joint tenants signs the petition, the frontage represented by such signature is not counted, allowance being made only where all of the joint tenants sign the petition.

SECOND: In cases where the title appears in tenants in common and one or more of the tenants in common sign the petition, allowance is made for the proportionate interest of the property represented by the signatures.

THIRD: In cases where a petition is signed in the name of an owner of record by some other person, who signs the petition as agent, the amount of frontage represented by such signature is allowed without requiring proof of the agency.

There is some conflict of opinion as to whether a co-tenant may consent for his proportionate interest in property. In *Nellis on Street Railways*, 2nd Ed., Vol. I, Sec. 35, it is said:

“A co-tenant cannot consent for his proportionate number of front feet, unless his co-tenants also sign.”

The author cites the case of *Ronnebaum v. Mount Auburn Cable Railway Co.*, 29 Ohio (L. J.) 338, wherein the court, among other things, says:

“If five-sixths of the owners can be represented by

five-sixths of the feet front of this lot, we have the case of the remaining co-tenant with a joint interest in that five-sixths not assenting, yet his interest is conveyed by his co-tenants."

No distinction is made in the authorities cited between joint tenants and tenants in common. The rule therein laid down appears to include both classes of co-tenants.

Our own Supreme Court has, however, held a contrary view in cases involving the rights of tenants in common.

Merritt v. City of Kewanee, 175 Ill. 537.

People v. Griesbach, 211 Ill. 35.

In the Griesbach case, *supra*, the court at page 37 says:

"The application purported to contain the names of the owners of 2,347.13 feet of such frontage, being an apparent excess of 94.16 feet over the requisite amount. Of the frontage so appearing on the application, 250 feet thereof was owned by five tenants in common, four, only, of whom signed the application. The trial court ruled the signatures of these four tenants in common should be accepted as representing 200 feet of the frontage of 250 feet owned by the five tenants in common. Counsel for the People contend that the signatures of tenants in common cannot be accepted as representing a proportionate part of the entire frontage of the common property.

"It is true, as argued, that tenants in common are seized of each and every part of the estate, and that one of such tenants has no power to convey the whole of the state or the whole of any distinct part or portion of it or to give a valid release for injuries done to it, and that one tenant in common cannot lawfully do any act that will work a permanent injury to the inheritance. But the argument that as a license to keep a dram-shop cannot, under the ordinance in question, be lawfully granted except upon the application and consent of a majority of the property owners, etc., it must be considered by the courts that the keeping of a dram-shop in the block is detrimental and injuries to the property abutting on the streets which surround the block, and that for that reason a tenant in common cannot be allowed to consent to that which must, as a matter of law, be considered to be injurious and detrimental to the common property, is not sound. The statutes provide for the presentation of petitions for the construction of local improvements by special taxation or special assessments, for the opening of highways, the creation of drainage districts and of towns

under township organization, and perhaps for other objects and purposes. Petitions are not required in such cases for the reason that the objects to be attained by the petition are to be deemed prejudicial or injurious in their nature, and therefore only to be granted in case those, or a portion of those, who will be prejudicially affected thereby shall signify their consent by way of a petition. Whether such objects are desirable and beneficial or prejudicial and detrimental are questions upon which the minds of those *interested* do not always agree, and the purpose of the provisions for petitions is to discover and give effect to the views and wishes of the greater number of those who are *interested* in the subject matter of the petition. The same is true as to the application for license to keep dram-shops, and courts will not declare, as a matter of law, that dram-shops are prejudicial and injurious to real estate in the vicinity because the ordinance in question prohibits the issuing of licenses to keep such shops except upon the application of a majority of the owners of such real estate. *The signing of such a petition by a tenant in common cannot be declared, as a matter of law, to be detrimental or injuries to the estate of himself and his co-tenants.* Whether the establishment of a dram-shop in the block surrounded by the streets upon which the common property abuts is injurious or beneficial to the property is a question upon which each tenant in common has the right to judge for himself, and we think each of such tenants in common has the right to sign such a petition as the representative of his proportionate interest in the property according to the frontage thereof. If this were not true, any one tenant in common, no matter how small his interest, would be given, by law, the power to determine for his co-tenants, no matter how many there might be of them or how much greater their interests, whether the common property would be benefited or injured by the location of a dram-shop in the block. It seems to us a narrow and unreasonable view that one of the co-tenants should be allowed to control all other of the owners. That each one should be regarded as a qualified petitioner for the proportionate part owned by him is the more just and the more reasonable conclusion."

While there is an essential difference between joint tenants in common, in that joint tenants hold the property by one joint title and in one right, whereas tenants in common hold by several titles or by one title and several rights, we cannot conceive why on principle the distinction between

a joint tenancy and tenancy in common should affect the question of frontage consents.

In *Wilkins v. Young*, 144 Ind. 1, it is said: "In the ancient language of the law, joint tenants were said to hold *per my et per tout*, or in plain words, 'by the moiety, or half, and by all.' The true interpretation of this phrase being, that these tenants were seized of the entire realty for the purpose of tenure and survivorship, while for the purpose of immediate alienation, each had only a particular part or interest."

If, as was said in the Griesbach case, the question of whether the object to be attained by the petition is desirable and beneficial or prejudicial and detrimental, is to be determined by the views and wishes of the greater number of those who are *interested* in the subject-matter of the petition, the signature of each joint tenant to a petition must be considered *to the extent of his interest in the property*. In the absence of any proof to the contrary, the shares or interests of joint tenants are presumed to be equal. (See 23 Cyc. 490.)

We are of the opinion that each co-tenant, whether the title appears of record as a joint tenancy or a tenancy in common, should be regarded as a qualified petitioner for his proportionate interest in the property.

As to the third proposition, we believe that the course now pursued by you is the correct one, unless the agency is questioned. (See Opinions of the Corporation Counsel from April 5, 1897, to April 10, 1905, compiled and edited by Edgar B. Tolman, Corporation Counsel, page 1202; also *Tibbets v. Railway Company*, 153 Ill. 147, 154.)

Respectfully submitted,

BRYAN Y. CRAIG,

JOS. F. GROSSMAN,

Assistants Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 28, 1913.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

You have asked for an opinion as to whether or not the city has the right to establish a penal institution for children outside of the city limits and make appropriations therefor.

If this question were to be answered categorically and limited to the precise proposition contained therein, we would be obliged to say that no such power exists; but from conversations had with you and other members of your committee, and other information that we have obtained, we have come to the conclusion that an arrangement such as is contemplated might perhaps be made.

As we understand the situation, it is proposed that the County of Cook shall purchase a tract of land consisting of eighty acres in Oak Forest upon which the city Board of Education will construct a school building with dormitories and other accommodations necessary for the housing of the inmates and attendants, and that the city will either maintain the institution or pay for the keep of the delinquents sent there instead of to the John Worthy school.

So far as establishing an institution of this kind on its own account is concerned, there is no warrant in law for doing so. The general rule applicable on this point is best stated by two paragraphs from Dillon on Municipal Corporations (5 Ed., vol. II, sec. 776, and vol. III, sec. 690), which reads as follows:

“Sec. 776 (446). **CONTRACTS IN RESPECT OF DRAINAGE.**—Although the general doctrine is that a municipal corporation *cannot usually exercise its powers beyond its corporate limits*, yet this right may be given either expressly or by implication; and a city with *express authority to provide drainage* was held, in the absence of any restriction, to possess the implied power, in order to find an outlet for sewage beyond its limits, to make a contract with an adjoining land owner giving it such an outlet.”

“Sec. 980 (565). **REAL ESTATE BEYOND CORPORATE LIMITS.**—Municipal corporations being created chiefly as governmental agencies, and for the attainment of local

objects merely, the general rule is that they *cannot purchase and hold real estate beyond their territorial limits*, unless the power is conferred by the legislature. It has been expressly decided that a conveyance to a municipal corporation of lands *beyond its boundaries, for the purpose of a street*, is void, though the corporation has by its charter power 'to purchase, hold, and convey any real property for the public use of the corporation.' The author is, however, of opinion that there are purposes for which such a corporation may, without special grant, purchase and hold extra-territorial lands, as for a pest-house, cemetery, park, and the like objects of a municipal character."

The author in notes supporting the text in section 980 cites a number of authorities which are not entirely in harmony with same, but the law is fairly well settled in this state that the city must confine itself to its corporate limits in the exercise of its powers unless there is express authority given to it to go beyond same. The authority of the city to establish a penal institution is contained in clause 69 of section 1, article V of the Cities and Villages Act, which reads as follows:

"*Sixty-ninth*—'To establish and erect calaboooses, bridewells, houses of correction and workhouses for the reformation and confinement of vagrants, idle and disorderly persons, and persons convicted of violating any city or village ordinance, and make rules and regulations for the government of the same, and appoint necessary keepers and assistants.'"

We must infer that the power granted in clause 69 is limited to the confines of the city, because the same section enumerates two powers with express authority to go beyond the limits. Clause 79 authorizes the establishment of cemeteries "within or without the corporation" and Clause 83 authorizes the prohibition of offensive or unwholesome businesses or establishments within the city or within one mile of the limits.

Since powers that may be exercised outside of the city limits are thus defined in two instances, we cannot assume that the legislature intended that the city should have the right to establish a penal institution outside of its borders. We say this even though it has been held that where the

necessity was great and there were no other means of exercising the powers granted except by going beyond the limits, there are some exceptions to the rule.

Dillon on Municipal Corporations (5th Ed.) 352.

Coldwater v. Tucker, 36 Mich. 474.

Gilchrist's Appeal, 109 Pa. St. 600.

There is another line of authorities to the effect that there is a distinction between property held by the city in its corporate capacity and in its private capacity, in the application of the general rule.

Schneider v. Menasha, 118 Wis. 298.

Lester v. Jackson, 69 Miss. 887.

We do not feel, however, that it is important to follow out this line of authorities, since it is quite clear that the city has no right to build and maintain a penal institution outside of its limits.

On the other hand, the city has authority to use the county jail under clause 70 of the section of the Cities and Villages Act above referred to, which reads as follows:

“Seventieth—To use the county jail for the confinement of offenders, subject to such conditions as are imposed by law, and with the consent of the county board.”

If the institution in question can be regarded as a county jail, therefore, a contract could be entered into by the city with the county for the purpose of housing prisoners there.

Hence, the power of the city in this respect hinges largely on the interpretation which the courts will put upon the words “county jail.” If these words are construed in their generic sense as meaning a place for the confinement of prisoners, as distinguished from the limited meaning in which they are frequently used conveying the idea of a common jail, then there seems to be ground for believing that the plan may be lawfully entered into. The statutes do not in express terms define a “county jail,” but there is an act which provides for a jail in each county and specifies the manner in which it shall be kept; and the inference is plain that when the “county jail” is mentioned in other Acts, the reference is to the county jail thus provided for. Nevertheless, since the Juvenile Court Act provides for other places of confinement,

it would not be straining the construction of clause 70 to hold that it includes a place for the detention of criminals supplied by the county.

Taking up the proposition as it is presented to us in its concrete form, we find that such an institution could be maintained by the county under the Juvenile Court Act. Such being the case, it must follow that the city would have the right to pay its proportion of the expenses of same if the institution took care of city prisoners.

The Juvenile Court Act provides that in counties having over 500,000 population a special court room shall be provided with books to be known as "Juvenile Court Record" and a court to be known as the "Juvenile Court." Section 9 of that Act provides that the court shall have power to commit any child brought before it "to an institution that has been or may be provided by the state, county, city, town or village suitable for the care of delinquent children."

We are informed that it is not the practice at the present time to arrest children on warrant for the purpose of prosecuting them for violation of the city ordinances. This is left entirely to the probation officers, who bring them directly to the Juvenile Court. All other juvenile offenders, if brought before the Municipal Court on a warrant, are immediately transferred to the Juvenile Court. Consequently, the Juvenile Court has complete control of the situation, and jurisdiction over all offenders such as are sent to the John Worthy School.

It would, therefore, be entirely within the power of the County of Cook to maintain an institution at Oak Forest for the purpose of taking care of the applicants that are now sent to the John Worthy School. In that event the city would have the right to contract with the county for the expense of keeping such delinquents. In *City of Chicago v. County of Cook*, 106 Ill. App. 47, although the court does not pass on the question here presented, we find some ground for believing that the courts would sanction such a procedure.

We, therefore, hold, in answer to your question, that while the city has no right to establish a penal institution of its own beyond the limits of the city, it can make some such arrangement as is proposed by paying its proportionate

share for the housing and keep of the prisoners for whom it would otherwise be responsible.

In coming to this conclusion we have ignored the question of the right of the Board of Education to build and equip such a school as is contemplated, since we were advised that the attorneys for the Board of Education would consider that phase of the question.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON.

Corporation Counsel.

OCTOBER 29, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

We are informed by members of the Harbor and Subway Commission that they have under consideration a plan for constructing by day labor a portion of the dock which is to extend out into the lake and form a part of the proposed harbor. Their plans contemplate the use of material in excess of the value of \$500.00 for such work, and the question has arisen whether it is possible for them to secure this material without advertising the full ten days required by ordinance.

This question calls for the construction of the following section of the statutes:

“Section 50. Any work or other public improvement, except any work or public improvement to be paid for in whole or in part by a special assessment shall, when the expense thereof shall exceed \$500, either be constructed by contract let to the lowest responsible bidder in the manner prescribed by ordinance (*Provided, however, any such contract may be entered into by the proper officers without advertising for bids, by a vote of two-thirds of all the aldermen or trustees elected*); or such work or other public improvement shall be constructed in the following manner, by a vote of two-thirds of all the aldermen or trustees elected, to-wit:

The Commissioner of Public Works or other proper officers to be designated by ordinance, shall superintend and cause to be carried out the construction of such

work or other public improvement and shall employ for the performance of all manual labor thereon, exclusively laborers and artisans whom the city or village shall pay by the day or hour, and all material of the value of \$500 and upward using in the construction of such work or other public improvement, shall be purchased by contract let to the lowest responsible bidder in the manner to be prescribed by ordinance.

In every city which has adopted an Act entitled, 'An Act to regulate the civil service of cities,' approved and in force March 20, 1895, every such laborer and artisan shall be certified by the Civil Service Commission to the Commissioner of Public Works or other proper officer, in accordance with the requirements of said Act, entitled, 'An Act to regulate the Civil Service of Cities.' "

Hurd's R. St. 1912, page 278.

Prior to the year 1911 there was no provision made for having work on a public improvement done otherwise than by contract. The section was, however, amended in 1911 so as to permit this. This feature of the act being so recent we are unable to find any judicial interpretation concerning the same, but regard the wording as so plain that it can not be misunderstood.

Our interpretation of this provision is that the city may carry on the work by day labor, but that if materials of the value of \$500 and upwards are required they must be advertised for and let to the lowest responsible bidder in strict conformity with the ordinances of the city.

The act in question authorizes the letting of contracts to the lowest responsible bidder in the manner prescribed by ordinance. It also permits the letting of such contract without advertising for bids by a vote of two-thirds of all the aldermen. Then it goes on to say that such work or public improvement may be constructed "in the following manner, by a vote of two-thirds of all the aldermen or trustees elected, to-wit: "

It will be observed that the provision for avoiding the advertising applies only to the letting of a contract and that there is no reference to this in the subsequent paragraph, which specifies exactly how the city shall proceed in case the work is done by day labor. This paragraph says

that in case materials of the value of \$500 and upwards are required they shall be purchased by contract let to the lowest responsible bidder "in the manner to be prescribed by ordinance."

We do not see how anything can be read into this paragraph to the effect that materials may be purchased without advertising in the same manner that a contract may be let for "work or other public improvement."

The ordinances of the city provide that all contracts for materials where the amount exceeds \$500 shall be let to the lowest responsible bidder after advertising the same. They also provide that in all cases advertisements shall be made and bids submitted and received by the proper officer in the same manner as is provided for the letting of contracts by the Commissioner of Public Works. (Chicago Code of 1911, Sec. 50.)

Under the provisions relating to contracts to be made by the Commissioner of Public Works (Sec. 2104) it is necessary to advertise the same for at least ten consecutive days.

It is true that in section 2104 there is provision made for letting contracts for material without advertising by a vote of two-thirds of all the aldermen elected, but as to this feature of the ordinance in question there is no positive inhibition in the statutes as there is in case of materials required when the work is done by day labor.

We are convinced, therefore, that it will not be lawful to purchase materials for work that is being constructed by day labor unless the same is advertised for and let to the lowest responsible bidder in accordance with the provision of the ordinances relating to same.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 31, 1913.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

Your letter of October 23rd, asking for an opinion as to whether it will be your duty to make deductions from the salaries of city employes and officers in pursuance of the Federal Income Tax Law, and also your letter of October 27th, asking for an opinion as to the effect of the income tax on certain obligations and certain revenues of the city, received.

The Federal income tax is provided for by the new tariff law known as "An Act to Reduce Tariff Duties and to Provide Revenues for the Government, and for other Purposes," and which was approved by the President October 3, 1913.

The fourth paragraph of clause B of section 11 of the Act reads as follows:

"That in computing net income under this section there shall be excluded the interest upon the obligations of a state or any political subdivision thereof, and upon the obligations of the United States or its possessions; also the compensation of the present President of the United States during the term for which he has been elected, and of the judges of the supreme and inferior courts of the United States now in office, and the compensation of all officers and employees of a state or any political subdivision thereof except when such compensation is paid by the United States Government."

It will be noted that this paragraph excludes the interest "upon the obligations of a state or any political subdivision thereof," and also, "the compensation of all officers and employes of a state or any political subdivision thereof except when such compensation is paid by the United States Government." The question therefore becomes whether or not a city is a political subdivision of a state so as to come within the purview of that clause of the statute.

The Supreme Court of the United States in *Jefferson City Gas Light Company v. Clark*, 95 U. S. 644, on page 654 said:

"A city is only a political subdivision of the state, made for convenient administration of the government."

The same term has been used as applied to a city by a number of other courts.

City of Guthrie v. Territory, 1 Okla. 188.

City of Guthrie v. New Vienna Bank, 4 Okla. 194.

Johnson v. City of San Diego, 109 Cal. 468.

State v. Levy Count, 1 Pennewill (Del.) 597.

Wooster v. Plymouth, 62 N. Hamp. 193.

It therefore clearly appears that the language of the Act in referring to a political subdivision of a state includes a city. This fact appears even more clearly when it is remembered that, when the Supreme Court of the United States in 1894 in the case of *Pollock v. Farmers' Loan & Trust Company*, 157 U. S. 429, declared a previous income tax unconstitutional, one of the points upon which the decision was given was that a taxation of interest from the income derived from state, county and municipal securities "is a tax on the power of the states and their instrumentalities to borrow money and is consequently repugnant to the Constitution." The securities concerning which that case arose were bonds of the City of New York.

In the same case the court states on page 584 that:

"A municipal corporation is the representative of the state and one of the instrumentalities of the state government. It was long ago determined that the property and revenues of municipal corporations are not subjects of Federal Taxation. *Buffington v. Day*, 78 U. S. 11 Wall. 115 (20, 122); *United States v. Baltimore & O. R. Co.*, 84 U. S., 17 Wall. 322, 332 (21, 597, 601). In *Buffington v. Day*, *supra*, it was adjudged that Congress had no power, even by an Act taxing all incomes, to levy a tax upon the salaries of judicial officers of a state, for reasons similar to those on which it had been held in *Dobbins v. Erie County Comrs.*, 41 U. S., 16 Pet. 435 (10, 1022), that a state could not tax the salaries of officers of the United States."

You are therefore advised that the Federal income tax does not apply to salary or compensation received by officers or employes of the City of Chicago or to amounts paid as interest on the obligations of the City of Chicago. No deductions should therefore be withheld by you from such amounts on account of the Federal income tax.

You have asked specifically as to the effect of the income tax on a number of different stated obligations and sources of revenue of the city. In regard to the same you are advised as follows:

INTEREST ON CORPORATE BONDS, WATER LOAN BONDS, JUDGMENT FUNDING BONDS, SPECIAL TAX WARRANTS, SPECIAL ASSESSMENT BONDS, WATER CERTIFICATES AND WATER PIPE EXTENSION CERTIFICATES.—These bonds are all obligations of the City of Chicago and the interest on them is therefore not included within the income upon which the tax is to be levied. To be sure, some of these bonds are payable solely out of a special fund and are therefore not general obligations of the City of Chicago. Thus, special assessment bonds are payable solely out of installments of a designated special assessment when the same shall have been collected. They are, however, made out in the name of the city, which is bound to pay upon them the designated funds when the same shall have been collected, and constitute special obligations of the City of Chicago. So far as the income tax is concerned, they are to be considered on the same plane as any other obligation of the city and the interest upon them is not subject to the tax.

INTEREST ON MORTGAGES.—Where the city has purchased property subject to a mortgage and has agreed to pay the same, the mortgage thereupon becomes an obligation of the city and therefore the interest upon the same is not subject to the income tax.

SALARIES OF REAL ESTATE EXPERTS, COMMISSIONERS, BOARD OF SUPERVISING ENGINEERS AND PAYMENT FOR SERVICES OF MEN TEMPORARILY EMPLOYED AS ACCOUNTANT EXPERTS, ELECTRICAL EXPERTS, ENGINEERS, ETC.—All of these salaries and wages come under the term “compensation of all officers and employes of a state or any political subdivision thereof,” and are not subject to the income tax. The fact that a man is employed only for a short time or for a specific purpose does not in any way change the fact that he is an employe of the City of Chicago during that time. No deductions should therefore be made from such payments because of the income tax.

PAYMENTS ON ACCOUNT OF CONTRACTS AND SUPPLIES.—The act, by paragraph 2 of clause E of section II, provides for the collection of the tax at the source by authorizing and requiring all persons, corporations, etc., to deduct and withhold the normal tax of one per cent. from “interest, rents, salaries, wages, premiums, annuities, compensation, remuneration, emoluments or other fixed or determinable annual gains, profits and income,” due from them to another person, etc., exceeding \$3,000 for any taxable year, other than certain dividends on capital stock and earnings of joint stock companies, etc. It is to be noted that the income covered by this clause is where the same is a fixed or determinable profit. It therefore does not cover the payments on contracts for work done, or materials or supplies furnished, as these payments for the most part represent the actual cost of the labor or material furnished and consequently the profit on the same is not fixed or determinable so as to come under the class of payments described by the act. No deductions should therefore be made from such payments on account of the income tax.

REVENUE OF THE CITY FROM TAXES, LICENSES, PERMITS, FRANCHISES AND SALES OF BONDS.—Paragraph (a) of clause G of Section II of the act, which provides that the normal tax of one per cent. imposed upon individuals shall likewise be levied upon the net income of “every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized,” contains the following provision:

“Provided further, That there shall not be taxed under this section any income, derived from any public utility or from the exercise of any essential governmental function accruing to any state, territory, or the District of Columbia, or any political subdivision of a state, territory, or the District of Columbia, nor any income accruing to the government of the Philippine Islands or Porto Rico, or of any political subdivision of the Philippine Islands or Porto Rico.”

All of the above payments are income derived from the exercise of essential governmental functions by the City of Chicago as a political subdivision of the State of Illinois. They are therefore expressly exempted under the terms of

the act and the city need not pay any Federal income tax upon them.

SALE OF WATER—The income derived from the water department is included under the terms of the provision last above stated, as it is derived from a public utility by the City of Chicago, a political subdivision of the State of Illinois, and no Federal income tax should be paid upon it.

THE CITY'S SHARE OF THE NET EARNINGS OF THE TRACTION COMPANIES AND INTEREST WHICH THE CITY RECEIVES ON FUNDS DERIVED FROM THAT SOURCE—Immediately following the provision in paragraph (a), clause G of Section II of the act last above set forth, there occurs the following provision:

“Provided, That whenever any state, territory or the District of Columbia, or a political subdivision of a state or territory has, prior to the passage of this act, entered in good faith into a contract with any person or corporation, the object and purpose of which is to acquire, construct, operate or maintain a public utility, no tax shall be levied under the provisions of this act upon the income derived from the operation of such public utility, so far as the payment thereof will impose a loss or burden upon such state, territory or the District of Columbia, or a political subdivision of a state or territory; but this provision is not intended to confer upon such person or corporation any financial gain or exemption or to relieve such person or corporation from the payment of a tax as provided for in this section upon the part or portion of the said income to which such person or corporation shall be entitled under such contract.”

The city's share of the net earnings of the traction companies is obtained by virtue of the traction franchises generally known as the Traction Ordinances of 1907, which are contracts made with a corporation by the city, a political subdivision of the state, such as is described in this provision. As a matter of fact, it will be remembered that this provision was inserted in the bill largely in response to the demand that the traction fund of the City of Chicago should not be interfered with by the act. It is to be noted that under this provision that part of the net earnings of the traction companies which is retained by them is expressly left subject to the tax, but the city's share of the net earnings is not

subject to the Federal income tax. Any interest which the city may receive from funds derived from this source is also income derived from the operation of these public utilities and is similarly exempt from taxation under the act.

PREMIUMS PAID BY THE CITY FOR SURETY BONDS, RENTS PAID BY THE CITY, AND RENTS RECEIVED BY THE CITY.—In advising you upon the matters above set forth, we have so far gone only into certain provisions of the act which exempt the funds and payments above described from its operation. It would, however, appear from the wording of the act that not only are these exceptions made but that the City of Chicago is not such “a corporation” as to be required either to pay the income tax upon its own income or to collect “at the source” any portion of the tax upon payments which it makes to persons, corporations, etc. At no place in the income tax sections of the act do the words “city” or “municipal corporations” appear. The phrase “State or any political subdivision thereof” is the only manner in which a city is designated therein. Nor is the word “corporations” at any place in the act so modified by any clause or adjective attached thereto as to indicate that it is meant that if unmodified it refers to municipal corporations. The word “corporations” is generally to be interpreted in connection with the context of the document wherein it appears.

Thus, in *Land Owners v. People*, 113 Ill. 296, at page 314, the Supreme Court of this state ruled that the word “corporations” in Article IX of the Constitution clearly relates to private corporations and not to local municipal corporations, saying, “This is so apparent upon the face of the Constitution that we deem the mere statement, of itself, sufficient.” The term “corporations” has in numerous cases been held not to include a municipal corporation.

Sherman County v. Simmonds, 109 U. S. 735.

In re Hamilton, 148 N. Y. 310.

Emory & Company v. Commissioners, 55 Atl. 1118 (Del.).

Iowa E. M. C. Ass’n. v. Schrader, 87 Iowa 659.

State of Caffery, 49 La. Ann. 1748.

Wallace v. Lawyer, 54 Ind. 501.

Brown v. Gates, 15 W. Va. 131.

Linehan v. City of Cambridge, 109 Mass. 212.

Switzer v. City of Wellington, 40 Kan. 250.

It therefore appears that the city is not such a corporation as required by the act either to pay the income tax upon its own income or to collect the income tax at its source upon payments made by it. Such provisions as appear in the act specifically exempting subdivisions of a state from the income tax do not in our opinion in any way interfere with this construction of the meaning of the word "corporations," but are merely inserted so that there can be no doubt that cities are so excepted.

In this connection it is well to note that in that portion of the act providing for collection of the tax at the source it is made the duty of "all officers and employes of the United States" as well as corporations, etc., to collect the same when the amount to be collected upon is over \$3,000. It would seem that if it were the intention of Congress that officers and employees of states or political subdivisions thereof should also perform this duty it would have been so stated in the act, and that, by omitting such officers and employees, a clear intention is shown that this duty is not imposed upon them.

The imposition of the Federal income tax upon rents received by the city, rents paid by the city and payments made to surety companies as consideration for surety bonds furnished to the city to guarantee the faithful performance of duties by officers, employes and contractors would interfere with the exercise of its functions by the city as a subdivision of the state quite as much as a similar tax upon the interest upon its bonds. Thus, where the city rents a building for use for city purposes a tax upon the rent which it pays therefor will have quite as much effect upon the question of how much rent it must pay as would a tax upon the interest on its bonds have upon its borrowing power in issuing bonds for the purchase of the same premises. Although the recently adopted Sixteenth Amendment to the Constitution of the United States authorizes Congress to collect taxes on "incomes, from whatever source derived," it is not clear that even this would authorize a Federal income tax upon the revenues

of a municipal corporation, and it will be noted that from no words appearing anywhere in the present act can any intention be discovered to do this.

Rents paid by the city, rents paid to the city and amounts paid to surety companies for surety bonds are therefore not subject to the Federal income tax.

We have taken up the amounts paid to the surety companies under this last heading merely because they are commonly known as "premiums" and the word "premiums" appears in paragraph 2, clause E of Section II of the act as among the payments upon which the normal tax shall be deducted at the source by corporations paying the same. As a matter of fact, in our opinion such a payment to a surety company is not to be included under the word "premiums" as used in that paragraph, the evident meaning of the word as used there being a bonus charged for a right to borrow upon stock or to obtain a loan or as additional interest. This is the general meaning of the word except when used in connection with insurance.

White v. Williams, 90 Md. 719.

Washington, etc., Ass'n. v. Stanley, 38 Or. 319.

Borrowers', etc., Ass'n. v. Eklund, 190 Ill. 257.

National, etc., Ass'n. v. Andrews, 95 Md. 696.

It is not such a fixed or determinable annual profit as is within the purview of that part of the act as it is the gross and not the net income of the company receiving it.

To sum up the matters above discussed *seriatim*, you are advised that you are not required under the terms of the Federal income tax sections of the Tariff Act to deduct any amount from any of these sums or to pay any Federal income tax thereon.

Respectfully yours,

CRAWFORD ROSS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 3, 1913.

GEORGE WESTON, Esq., Chairman of Committee, etc.

Dear Sir:

In regard to the above matter you ask us this question:

“To what extent is the property owner or building contractor, or both, liable for damage done to public utility and municipal improvements in the streets where settlement has occurred adjacent to buildings under construction?”

The general principle with regard to the right of an owner of real estate to the support of the adjacent soil is that each owner is entitled to the lateral support of the adjacent soil for his own soil in its natural condition, but is not entitled to place buildings or other heavy improvements upon his own soil and then claim an additional easement of lateral support for such buildings, etc.

City of Quincy v. Jones, 76 Ill. 231.

Kramer v. Northern Hotel Co., 185 Ill. 612 (pp. 616 to 617).

Transportation Co. v. Chicago, 99 U. S. 635.

Thurston v. Hancock, 12 Mass. 229.

O'Connor v. Pittsburgh, 18 Pa. 187.

It seems that, in the case of streets or highways, the easement is somewhat broader, and extends to a right to lateral support for the street as a street, and for all street uses, properly so-called.

Dillon on Municipal Corporations, 5th Ed., Vol. 3, par. 1153, p. 1824; and Vol. 4, par. 1679, p. 2934.

New York Steam Co. v. Foundation Co., 195 N. Y. 43,

and other cases cited in the notes to the paragraphs of Dillon on Municipal Corporations above cited.

From a conference had with you by Mr. Dillon of this office, and an inspection made by you and him of the conditions at present existing around the new building being erected by the Commercial National Bank at the corner of La Salle and Adams streets, we conclude that the public improvements which you refer to are street car tracks, water pipes, gas pipes, telephone and electric light conduits, etc.

Inquiries made of Mr. Gurley and Mr. Fish in the offices

of the Chicago Railways Company, have disclosed the fact that Mr. Gurley has advised that the owners of these properties are liable for damages caused by excavations for foundations to the tracks of the street railway; that it has been the practice of the company for some years past to furnish bills for these damages to such owners accompanied by a request for settlement; that in some cases no notice has been taken of these bills; that in other cases answering letters have been received repudiating all liability; and that in one case, being that of the owners of the new Commercial National Bank Building above referred to, an answer has been received admitting the liability and expressing a willingness to settle on being satisfied that the amount claimed is reasonable.

We are of the opinion that the city, or the public utility corporations, as the case be, owning these street improvements is or are entitled to recover for the damages caused to such improvements by the excavations.

You ask whether the owner or the contractor is liable, or both. In answering this question, we assume that the damage is the necessary result of the carrying out of the contract with reasonable care, and not the result of negligence on the part of the contractor. On this assumption, we answer you that both owner and contractor are liable. The doctrine of independent contractor does not apply in such case.

Murray v. Arthur, 98 Ill. App. 331.

Yours respectfully,

WM. DILLON,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

NOVEMBER 3, 1913.

HON. JAMES H. LAWLEY, Chairman, Sub-Committee, Committee on Health.

Dear Sir:

Your communication of the 27th ult., with reference to the proposed filling in of the canal commonly known as "Bubbly Creek" has been given due consideration by this department.

You have therein propounded certain questions which are herewith answered in the order in which they were asked:

I.

Have the conditions of the ordinance granting permission for the construction of the canal known as the east part of Bubbly Creek * * * been complied with, either in whole or in part?

The answer is, they have not been complied with. Under the ordinance of 1869 the vacation of Egan street west of Halsted street is conditioned upon—

a. The extension of F street in a straight line west to intersect with the north and south part of canal. Less than half of this condition has been fulfilled.

b. The opening of a new street, about 500 feet south of the proposed canal and running 2,200 feet, more or less west, beginning at Halsted street. No part of this condition has been observed.

c. The opening and maintaining of a free canal which shall be navigable for vessels of all descriptions and the erection and maintenance of swing bridges across the canal.

It is sufficient to answer that the canal has never been maintained as a navigable waterway.

II.

In the event of the filling in of the east part of Bubbly Creek would the title of the filled in land be in the City of Chicago or in the owners of the abutting property?

The answer is, all of Egan avenue as then existing west of Halsted street, to a uniform width of 66 feet and the south 75 feet of what was then known as Tucker, Gage, Laurel and

Ullman streets, would be in the City of Chicago. The balance of the 150 feet which appears to be the width of the canal, would revert to the owners of the abutting property.

III.

In the event of the filling in of the west part of Bubbly Creek, would the title to the filled in land be in the City of Chicago or in the owners of the abutting property?

The answer is, the property as filled in would revert to the city wherever the canal has been established upon a public street and to the property owners wherever such is not the case.

For general information we have had prepared by the city clerk a copy of Document No. 2435 including the plat attached thereto, which latter shows the location of the proposed canal and of the streets to be extended and opened.

We note from the resolutions of the South Side Business Men's Association which accompany your communication, that 39th street for years prior to the establishment of the Union Stock Yards was a public highway—the "Township Line Road," from Halsted street west to Archer avenue. If this can be established a very much needed thoroughfare might be added to the district in question.

However, that is not a matter for present discussion.

Herewith please find copy of resolutions and certified copy of Document No. 2435.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 3, 1913.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

On October 27, 1913, your Honorable Body passed an ordinance directing the Corporation Counsel to present to you

at the next regular meeting of the Council, his opinion upon the powers of the City Council to prescribe regulations that will serve to put an end to the activities of physicians and others publicly advertising alleged cures or treatments for venereal diseases. (See C. P. of October 27, 1913, pp. 2359-2360.)

The regulation of the medical profession is primarily lodged in the state under its police power. The legislature has seen fit to create a State Board of Health with power to issue licenses to practice medicine and to revoke the same for any unprofessional or dishonorable conduct.

Under an act entitled "An Act to prohibit physicians from practicing medicine in the name of another physician, or by holding themselves out as other physicians for the purpose of imposing upon or defrauding any other person in this state," approved May 11, 1901, any person practicing medicine within this state in the name of another physician, or holding himself out as another physician by advertisement, bills, posters or otherwise, for the purpose of imposing upon or defrauding any other person, may be fined not less than Five Hundred Dollars for the first offense and imprisoned for six months in the county jail for each offense committed thereafter. (See Hurd's R. S. 1909, p. 1475.)

In addition to the punishment provided in said act the State Board of Health may revoke the license of any physician who advertises under a name other than his own. (See *People v. Appelbaum*, 251 Ill. 18.)

The City Council has not, however, such broad and plenary power to regulate and prohibit the practices of "quack" doctors. Under its charter to regulate and prevent the use of streets, sidewalks and public grounds for signs, posting handbills and advertisements, to regulate and prohibit the exhibition or carrying of banners, placards, advertisements, or handbills in the streets or public grounds, or upon the sidewalks, to regulate sales upon the streets, sidewalks and public places, to suppress all fraudulent devices and practices for the purpose of gaining or obtaining money or property, to prohibit the sale or exhibition of obscene or immoral publications, prints, pictures or illustrations, to pass and en-

force all necessary police ordinances, to declare what shall be a nuisance and to abate the same and to impose fines upon parties who may create, continue or suffer nuisances to exist, the City Council may regulate, suppress and prohibit such objectionable and fraudulent advertisements as are properly within the scope of the powers of the City Council hereinabove enumerated.

Indeed, there are now in full force and effect, the following ordinances upon this subject matter:

“178. MEDICAL ADVERTISEMENTS PROHIBITED—PENALTY.) No person or corporation shall post or cause to be posted on any advertising wagons, or upon or in any place within the city where the same can be seen from the streets, alleys or other public places of the city, any advertisement, handbill or notice of any character whatsoever, giving or purporting to give information from whom or where medicine or remedies of any kind may be obtained for the cure, prevention or treatment of uterine diseases, or diseases peculiar to females; venereal diseases, or diseases of the genital organs; or nervous debility, impotence, sterility, or barrenness; gonorrhea, gleet, stricture, syphilis, affection of the prostate gland, abortion or miscarriage, or articles or means of preventing conception, under a penalty of not less than twenty-five dollars nor more than fifty dollars for each offense.”

“2020. LITERATURE CONTAINING INFORMATION CONCERNING NATURE OF AND REMEDIES FOR CERTAIN DISEASES.) No person shall sell or offer to sell, give away or offer to give away, distribute or have in his possession with intent to give away, sell or distribute in or upon any street or sidewalk, or park or public property of the city, any book, pamphlet, circular, handbill, advertisement or notice of any kind purporting to treat of or treating of diseases known as ‘venereal diseases,’ describing or explaining or purporting to describe or explain the genital organs, giving or purporting to give the nature and remedies of diseases peculiar to females, uterine diseases, or the nature or causes of nervous debility, impotency, sterility or barrenness, gonorrhea, gleet, stricture, syphilis, affection of the prostate gland or the remedies therefor, or the cause or remedies for abortion or miscarriage or articles or means of preventing conception, under a penalty of not less than twenty dollars nor more than fifty dollars for each offense.”

"2021. LITERATURE CONTAINING INFORMATION FROM WHOM OR WHERE MEDICINE TO CURE OR PREVENT CERTAIN DISEASES MAY BE OBTAINED.) No person shall sell or offer to sell, give away or offer to give away, distribute or have in his possession with intent to give away, sell or distribute in or upon any street, sidewalk, park or public property in the city, any book, pamphlet, circular, handbill, advertisement or notice of any kind giving or purporting to give information from whom or where medicine or anything whatever may be obtained for the cure, prevention or treatment of uterine diseases, or diseases peculiar to females, venereal diseases, or diseases of the genital organs, or nervous debility, impotence, sterility, or barrenness, gonorrhea, gleet, stricture, syphilis, affection of the prostate gland, abortion or miscarriage, or articles or means of preventing conception. Any person or corporation violating any of the provisions of this section shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense."

"2022. ADVERTISEMENTS GIVING INFORMATION CONCERNING CERTAIN DISEASES OR CONDITIONS PROHIBITED.) It shall be unlawful for any person to advertise, print or publish, or cause to be advertised, printed or published, in any newspaper or other publication having a general circulation in the city, or which is sold or offered for sale within the city, any advertisement, notice or mention of any kind whatsoever giving or purporting to give any information of, from whom, or where, apparatus, medicine, remedies or alleged cures may be had or obtained for the cure, prevention or treatment of uterine diseases, or of diseases peculiar to females, or of venereal diseases, or of diseases of the genital organs, or of nervous debility, impotence, sterility or barrenness, or of gonorrhea, gleet, stricture, syphilis or affection of the prostate gland, or from whom, or where, may be obtained any advice, information, direction or knowledge of any drug, medicine, mixture, preparation, instrument, apparatus or means of any kind whatever for the purpose of causing or procuring a miscarriage by any woman pregnant with child, or for the purpose of causing or producing an abortion, or for the purpose of preventing conception. Any person violating any of the provisions of this section shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense."

"2023. ADVERTISING QUACK NOSTRUMS.) No person shall place or post, or cause to be placed or posted, in any street or other public place in the city any handbill

or advertisement giving notice of any person having or professing to have skill in the treatment or curing of any disorder or disease, or giving notice of the sale or exposure for sale of any nostrum or medicine, under a penalty of not more than twenty-five dollars for each offense."

There is only one other provision which might be made by your Honorable Body to interfere with the activities of the "quacks," and that is an ordinance to prohibit false and fraudulent advertising modeled after the Wisconsin law, but limited in its scope so as to come within the powers of the City Council to regulate its subject matter. If your Honorable Body so desires, we will draft such an ordinance for your consideration.

Respectfully submitted,
JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 3, 1913.

L. E. GOSSELIN, Esq., Deputy City Comptroller, City of Chicago.

Dear Sir:

Replying to your letter of October 14, 1913, relative to warrant for collection (23828-1907), Illinois Central Railroad Company, for \$1,358.05, we beg to advise you that in the absence of some specific agreement or in the absence of proceeding by special assessment to pave a street upon which the company has built a station, we are of the opinion that by reason of the decision of *People v. I. C. R. R. Co.*, 235 Ill. 374, the city is unable to collect in cases of this kind.

In the case just referred to, the city undertook to make the Illinois Central pay for paving Sixty-third street in the same manner that it is now seeking to require said company to pay for the pavement of Fifty-seventh street. There was there involved the same track elevation ordinance that pertains to the track elevation and subway at Fifty-seventh street, and the court there held, that the Illinois Central Railroad

Company was not liable to re-pave said subway and it necessarily follows, of course, that, if it was not liable to do the paving of the subway, it was not liable to pay the city for the expense of so doing.

Of course, there are some instances in which, by the terms of the track elevation ordinance, the railroad company, or companies in question, undertook to maintain the pavement in the subway either in perpetuity or for a fixed period of time, but in the absence of such a provision, it is a useless expenditure of energy to carry an account of this kind on the city's books.

We would suggest that hereafter in all pending matters of this kind, where it is expected to hold a railroad company, that the effort to hold them be made in a special assessment proceeding, although we are not prepared to say that the property of the company would be subject to special assessment except in cases when they have depots, access to which is gained by means of the street or streets to be paved.

Yours truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 3, 1913.

HON. JOHN KJELLANDER, Chairman, Sub-committee, Committee on Judiciary.

Dear Sir:

You asked the undersigned to advise your committee with reference to the present status of the ordinances regulating the fares to be charged in automobiles and taxicabs, in order to guide you in your investigation of the rates of fare charged in such public vehicles.

Accompanying one of the orders which you turned over to us was some correspondence relating to charges of the Frank Parmelee Co., and you explained that this company claimed the right to charge the rates mentioned by reason

of the fact that they do not occupy public cab or hack stands in soliciting business.

The question as to whether the established rates apply to all public motor vehicles has arisen from time to time, and this department is on record with several opinions concerning the same. We had occasion only a short time ago to call attention to the fact that by the amendment of various sections of the Code passed June 19, 1911, and appearing on pages 532-4 of the Council Proceedings of that date, all regulation of rates of fare for automobiles which are not taxicabs and which do not occupy public cab or hack stands is wiped out. We refer particularly to the amended section 2613 which now contains a provision to the effect that same shall apply only to vehicles of the kind described in section 2588, the latter section being the one which requires licenses for motor vehicles occupying public cab or hack stands. In fact, we have the anomalous condition of a penalty being provided for a person who refuses to pay for services rendered by a vehicle obtained from a garage keeper "in accordance with the rates established by this article" when there are no rates whatever established.

From the above you will observe, that in case the Parmalee Company does not in fact use the public cab or hack stands or solicit business while on the streets or public ways of the city, there is no limit to the fare that it may charge.

At the present time there is a rate fixed for motor vehicles which stand or are kept upon public cab or hack stands or upon any street or public way in the city seeking employment, and there is also a rate fixed for taxicabs. We understand the rate for taxicabs to apply in every case whether the same are operated from public stands or from garages, if the vehicle is a taxicab.

We return herewith two Council orders and attached correspondence, also a letter from the Mayor with comparative

statement attached thereto, all of which was submitted to us for consideration.

Very respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 3, 1913.

RAY PALMER, ESQ., City Electrician.

Dear Sir:

On October 27, 1913, you wrote us as follows:

“ELECTROLYSIS.

Will you kindly advise me if the city or citizens would have legal redress against surface railway companies for damages which might be done to its structures by stray currents from such railways, in case the provisions with reference to electrolysis in Section 8 of the proposed draft of the ordinance authorizing unified operation of the street railways were fully complied with?”

Replying thereto we beg to advise you.

The only case that we can find touching the matter of the liability of street car companies to the city for damages to the city's water pipes by reason of electrolysis is the case of *Dayton v. City Railway Co.*, 16 Ohio Circ. Decisions, 736. In this case, in a lengthy opinion, the court laid down the rule denying compensation to the city. A part of the opinion is as follows:

“Under the grant to the defendant by the city to equip with the single trolley, in the use of that system the defendant would be liable only for actual negligence. In granting such right the city must be taken to have contemplated, and condoned by anticipation, any mischief arising from the reasonable use of such system. *Telegraph Co. v. Baker*, 2 Chan. Div. L. R. 1893, 186.”

We believe that this opinion correctly states the law and that in the absence of any provision in the grant to the traction companies by which the city is to be kept harm-

less or reimbursed, the city would have no remedy unless negligence by the companies can be established.

This situation seems to have been anticipated by the framers of the ordinances of February 11, 1907, Section 42 of the ordinance to the Chicago Railway's Company and Section 40 of the ordinance to the Chicago City Railway Company is as follows:

"Section 42. The company shall forever indemnify and save harmless the said city against and from all damages, judgments, decrees, costs and expenses which the said city may suffer or which may be recoverable from or obtained against the said city, for or by reason of the granting of the privileges hereby conferred upon the company, or for or by reason of or growing out of or resulting from the exercise by the company of the privileges hereby granted, or any of them, or from any act or acts of the company, its servants or agents, under or by virtue of the provisions of this ordinance."

Under this clause it is clear that both of these companies are bound to pay the city for any damage to its property which it may suffer by reason of electrolysis and are also bound to reimburse the city to the extent of any damages which the city may be compelled to pay any third persons for damage by reason of electrolysis.

This being the situation as it exists at the present time the question then arises "does the proposed unified operation ordinance change this contract." Section 2 of the proposed ordinance contains the following language:

"Section 2. The operating agreement mentioned in section 1 hereof and this ordinance shall be subject to all the terms, stipulations, requirements, conditions and obligations of the 1907 and subsequent traction ordinances of the City of Chicago, except so far as these ordinances are modified or supplemented by this ordinance."

There is also in section 8 of the proposed ordinance an extensive plan to overcome the damage caused by electrolysis.

These are the only provisions in the proposed ordinance touching electrolysis. Do these provisions modify or supplement the ordinances of February 11, 1907, as regards damage by electrolysis?

Repeals by implication are not favored in law. Unless it

can be said that the proposed ordinance in *express* terms repeals the provisions of the 1907 ordinances then the 1907 ordinances are still in force after the passage of the proposed unification ordinance. If the provisions of the proposed unification ordinance can be construed in harmony with the 1907 ordinances then all these ordinances will remain in force.

We believe that this will be the situation here and that the passage of the proposed unification ordinance will not change the liability of the companies to the City of Chicago for any damage caused by electrolysis whether due to the negligence of the companies or not.

Answering your inquiry as to the rights of citizens or public service corporations to recover damages from the street car companies by reason of electrolysis we would say that whatever rights such persons or corporations now have will be unaffected by the passage of the proposed unification ordinance.

No action of the council can in any manner impair the rights of persons other than the contracting parties.

Very respectfully,

GEO. L. REKER,

MAX M. KORSHAK,

Assistants Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

NOVEMBER 4, 1913.

HON. GEORGE A. SCHILLING, President, Board of Local Improvements, City of Chicago.

Dear Sir:

In reply to your inquiry as to whether or not the railroads whose tracks are spanned by the Twelfth street viaduct may be compelled by the city to construct a new and wider viaduct, we beg to advise you as follows:

We assume that a new viaduct of the proportions mentioned in your communication is necessary in order to adequately accommodate the traffic needs of the street in question.

The obligation of railroads, situated as those in question are, is predicated upon their duty to provide for the public safety under circumstances where that safety is being endangered by the operation of their trains. It is, of course, apparent that if it were not for the presence of the railroads, referred to in your communication, traffic on Twelfth street, at the point in question, could proceed in safety.

It is the presence of the tracks of the railroads in question across Twelfth street and the operation thereon by said railroads of large numbers of ponderous, rapidly moving trains that endangers the safety of the public having occasion to travel on Twelfth street at the point in question. It does not seem unreasonable therefore that, inasmuch as the railroads occasion a danger to the public, they should at their own expense be required to protect the public from the danger which they occasion.

We believe that the obligation to protect the public, under the circumstances above mentioned, was imposed upon the railroads by the common law, and that in addition thereto said obligation is imposed upon railroads by statute.

Section 71, Chapter 114, Hurd's Statutes, provides:

"Hereafter, at all of the railroad crossings of highways and streets in this state, the several railroad corporations in this state shall construct and maintain said crossings, and the approaches thereto, within their respective rights of way, so that at all times they shall be safe as to persons and property."

Sections 72, 73 and 74, of the same chapter, are as follows:

"72. Neglect to Make, etc., Crossings—Notice.) Whenever any railroad corporation shall neglect to construct and maintain any of its crossings and approaches, as provided in section 8 of this act, it shall be the duty of the proper public authorities, having the charge of such highways or streets, to notify in writing, the nearest agent of said railroad corporation of the condition of said crossing or approaches, and direct the same to be constructed, altered or repaired in such manner as they shall deem necessary for the safety of persons and property."

"73. When Company Neglects, Authorities to Construct, etc.) Sec. 10. If any railroad corporation of

this state shall, after having been notified, as provided in section 9 of this act, neglect or refuse to construct, alter or repair such crossing or approaches within thirty days after such notice, then said public authorities shall forthwith cause such construction, alteration or repairs to be made."

"74. Company to Pay Expense and \$100.) Sec. 11. Said railroad corporation shall be holden for all necessary expenses incurred in making such construction, alteration and repairs, and in addition thereto shall be liable to a fine of \$100 for such neglect to comply with the requirements of this act, which fine shall be enforced by the said public authorities, in the name of the People of the State of Illinois, before any court of competent jurisdiction in the county. Such fine, when collected, to be paid into the treasury of the authorities enforcing the fine."

The legislature evidently deeming that the general provisions, prescribed for by the sections of the state last above referred to, might be inadequate, conferred upon municipalities broad and additional powers concerning the subject-matter in question.

Paragraphs 25, 26 and 27 of Section 62, Chapter 24, Hurd's Statutes, conferred upon municipalities power:

"Twenty-fifth. To provide for and change the location, grade and crossing of any railroad."

"Twenty-sixth. To require railroad companies to fence their respective railroads, or any portion of the same, and to construct cattle guards, crossings of streets and public roads, and keep the same in repair, within the limits of the corporation. In case any railroad company shall fail to comply with any such ordinance, it shall be liable for all damages the owner of any cattle or horses or other domestic animal may sustain by reason of injuries thereto while on the track of such railroad, in like manner and extent as under the general laws of this state, relative to the fencing of railroads; and actions to recover such damages may be instituted before any justice of the peace or other court of competent jurisdiction."

"Twenty-seventh. To require railroad companies to keep flagmen at railroad crossings of streets and provide protection against injury to persons and property in the use of such railroads. To compel such railroads to raise or lower their railroad tracks to conform to any

grade which may, at any time, be established by said city, and where such tracks run lengthwise of any such street, alley or highway, to keep their railroad tracks on a level with the street surface, and so that such track may be crossed at any place on such street, alley or highway. To compel and require railroad companies to make and keep open and to keep in repair ditches, drains, sewers and culverts along and under their railroad tracks so that filthy or stagnant pools of water cannot stand on their grounds or right of way, and so that the natural drainage of adjacent property shall not be impeded."

We, therefore, have no hesitancy in advising you that the City of Chicago has plenary authority to compel the railroads, whose tracks are beneath the Twelfth street viaduct, to construct a new viaduct of sufficient size to adequately accommodate the traffic having occasion to use said viaduct.

If the city sees fit to exercise the power above mentioned, it should do so by the passage of an ordinance commanding the railroad companies in question to construct a viaduct of a specific nature to be set forth in said ordinance, and said ordinance should fix the proportion of the expense of such construction that each railroad should bear. The ordinance should further provide that in case the railroads do not proceed to comply therewith within a reasonable time, to be fixed by the ordinance, that the Commissioner of Public Works should construct the viaduct on behalf of the city, and that thereupon the railroads in question should become liable to the city for the expense of such construction.

We believe that ample authority for our conclusions will be found in:

City v. Jackson, 196 Ill. 496;

City v. P. C. C. & St. L. R. R. Co., 146 Ill. 403;

Northern Pacific Ry. Co. v. State, 208 U. S. 483;

C. B. & Q. R. R. Co. v. Nebraska, 170 U. S. 57; and

N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S. 556.

We have no doubt that the railroad companies involved will construct the new viaduct without any action being taken by the council requiring them so to do.

In this opinion we have simply endeavored to indicate what the city's powers in the premises are and the action

that it is in a position to take in the absence of an agreement covering the subject.

Respectfully yours,

CHAS. M. HAFT,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 4, 1913.

HON. MELVILLE G. HOLDING, Chairman, Sub-Committee on
Judiciary, Council Chambers.

Dear Sir:

In reply to your request for an opinion as to the power of the city to license automobile schools, I submit the following:

Under the Cities and Villages Act, neither the power to regulate or to license automobile schools is specifically granted the city, and these powers cannot be derived by implication from any of the special provisions conferring authority on cities to regulate and license other occupations and things.

The question, therefore, resolves itself into a determination whether the regulation and licensing of automobile schools comes within the scope of the police powers of the city. In order to reach a conclusion on the above question, we must consider the purpose of the requirement of license. The order of the City Council says, "The object of said license being to better regulate said schools and to prevent them from flooding the market with incompetent chauffeurs who are causing a large number of the automobile accidents of today."

Where authority for the enactment of an ordinance is sought from the general powers of the city as conferred by the statute, such ordinance must be reasonable.

The theory upon which the city, under its present powers, could enact an ordinance licensing automobile schools, would be that such regulation is a necessary police regulation. We cannot conceive how this would be such a regulation, inasmuch as the patrons of such schools may not necessarily ever drive automobiles in this city. I may here state, that I am

assuming the object of the proposed ordinance is to remedy the danger of incompetent chauffeurs driving automobiles in this city after taking an incompetent course of instruction in such schools.

So far as the qualifications of chauffeurs driving automobiles in this city can be determined, and so far as chauffeurs can be regulated, I am of the opinion that Section 2696 of the Chicago Code of 1911 covers the same. This section requires the examination and licensing of chauffeurs who shall propel or drive motor vehicles engaged in transportation of passengers, merchandise or any other purpose, for hire or reward upon or along any street or public place in this city. The validity of this section was attacked and the Supreme Court in sustaining the ordinance in the case of *Chicago v. Kluever*, 257 Ill. 317, after referring to Section 12 of the Motor Vehicle Act passed in 1911 (H. R. S. 1912, pp. 2041-2049), which it was claimed took away from the city the power to pass Section 2696 of the Chicago Code of 1911 says on page 325:

“There is also a proviso giving the city control of the excepted vehicles. That proviso is, that nothing in the act contained shall be construed as affecting the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor-driven commercial vehicles and motor bicycles which are used within their limits for public hire. The power exercised in this ordinance is by the proviso expressly reserved to the city.”

It appears from the Kluever case that the power of the city to pass ordinances relating to the operation of motor vehicles in its streets is limited to the class of vehicles excepted by the proviso in Section 12 of said act which section is in part as follows:

“No owner of a motor vehicle, except motor trucks and motor-driven commercial vehicles, or motor bicycles, who shall have obtained a certificate from the secretary of state * * * shall be required * * * to obtain another license or permit to use or operate the same * * * provided, that nothing in this act contained shall be construed as affecting the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor-driven commercial vehicles and motor vehicles which are used within

their limits for public hire, or from making and enforcing reasonable traffic and other regulations except as to rates of speed not inconsistent with the provisions hereof."

It is difficult to conceive how the City Council can license automobile schools for the purpose herein stated, when it has not the power to require chauffeurs other than those who operate motor vehicles used for public hire to take examinations. It must surely be conceded that the most direct way to accomplish the purpose desired would be to examine all chauffeurs, but this the city has not the power to do in view of the said Motor Vehicle Law.

Finding no power in the city to enact an ordinance licensing automobile schools, I deem it unnecessary to further prolong this opinion by discussion of the constitutionality of such an ordinance. Suffice it to say, that the city cannot license automobile schools under its present powers.

Very respectfully yours,

LORING R. HOOVER,
LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

NOVEMBER 10, 1913.

HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

We are in receipt of the letter of the Second Deputy Superintendent of Police, dated October 25, 1913, making the following inquiries:

"1. The question has arisen as to whether the Police Department has the authority, under the city ordinances or laws already on the statute books, to prohibit the exhibition of pictures or paintings of nude women, either hung in frames or painted upon the walls of saloons or cafes.

2. Also has the Police Department authority to cause the removal of paintings or pictures of nude women installed in saloons or cafes."

Par. 223, Sec. 223, Ch. 38, p. 803, Hurd's Rev. Statutes of Illinois 1912, Criminal Code, under heading of Obscene Books, etc., is as follows:

“Whoever brings, or causes to be brought, into this state, for sale or exhibition, or shall sell or offer to sell, or shall give away or offer to give away, or have in his possession, with or without intent to sell or give away, any obscene and indecent book, pamphlet, paper, drawing, lithograph, engraving, daguerreotype, photograph, stereoscopic picture, model, cast, instrument or article of indecent or immoral use, or shall advertise the same for sale, or write or cause to be written, or print or cause to be printed, any circular, handbill, card, book, pamphlet, advertisement or notice of any kind, or shall give information orally, stating when, how or of whom, or by what means any of the said indecent and obscene articles and things hereinbefore mentioned can be purchased or otherwise obtained, or shall manufacture, draw and expose, or draw with intent to sell, or to have sold, or print any such articles, shall be confined in the county jail not more than six months, or be fined not less than \$100 nor more than \$1,000 for each offense—one-half of said fine to be paid to the informer upon whose evidence the person so offending shall be convicted, and one-half to the school fund of the county in which the said conviction is obtained.”

Section 2024 of the Chicago Code of 1911 as amended on April 28, 1913, Council Proceedings, page 225, contains the following:

“2024. INDECENT OR LEWD BOOKS, PICTURES, PLAYS, ETC.—Exhibition of Picture of Nude Figure.) It shall be unlawful for any person to exhibit, sell or offer to sell, or circulate or distribute, any indecent or lewd book, picture or other thing whatever of an immoral or scandalous nature, or to exhibit, in any place where the same can be seen from the public highway or in a public place frequented by children which is not connected with any art or educational exhibition, any picture representing a person in a nude state, or to exhibit or perform any indecent, immoral or lewd play or other representation under a penalty of not less than twenty dollars (\$20.00) nor more than one hundred dollars (\$100.00) for each offense.”

Clause 45 of Section 1, Article V of the Cities and Villages Act gives the city the power to prohibit the sale or exposition of obscene or immoral publications, prints, pictures or illustrations.

The word "obscene" has been defined as,

"Offensive to modesty and decency; impure; unchaste; indecent; lewd; offensive to modesty."

Century Dictionary, Vol. 4, p. 4062.

Not every picture of a nude woman is obscene. There are many of that class of pictures which are regarded as among the highest forms of art. There are others in which art predominates but which trench on the obscene.

To determine where art ends and where obscenity begins is not a legal question, and no hard and fast rule can be laid down for you to follow in your endeavor to weed out obscene pictures that are displayed in saloons or cafes. Even the most precise interpretations that have found expression in the published decisions of the courts do not enable us to formulate a more exact definition than to say that a picture is obscene if it "appeals to the animal passion, stimulating it and corrupting and debauching the mind and heart."

U. S. v. Durant, 46 Fed. 753.

Ex parte Doran, 32 Fed. 76.

U. S. v. Chesman, 19 Fed. 497.

U. S. v. Smith, 45 Fed. 476.

Com. v. Landis, 8 Phila. 453.

People v. Muller, 96 N. Y. 408.

While we are unable, therefore, to draw the line in words so that any one may distinguish between a picture that is obscene and one that is not, it is entirely safe to say that any picture that exhibits or baldly suggests sexual impurity can be regarded as obscene and can be suppressed wherever it is found, whether in a public place like a cafe or saloon or in a private house. In passing on the federal statute relating to these matters, the United States Supreme Court in *Swearingen v. U. S.*, 161 U. S. 451, said:

"The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity."

The Police Department has the authority to cause the removal of such offensive pictures, as well as to prosecute under the statute and ordinance above set forth.

It will be noted also that aside from the power to abate

as a nuisance and to prosecute for a picture that is actually obscene, the police may prosecute, under Section 2024 of the Code, and suppress by causing the removal if need be, any picture representing a person in a nude state exhibited so that it can be seen from the public highway, or in a public place frequented by children which is not connected with any art or educational exhibit. This latter provision has reference to any picture of a nude person whether it is obscene or not.

Consequently, you will observe that there is a clear distinction drawn between the power of the police in reference to nude pictures that are not obscene (which can only be suppressed under certain conditions) and nude pictures that are obscene (which can be suppressed under any circumstances).

Yours respectfully,
E. J. QUEENY,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 8, 1913.

CHARLES W. NEUBAUER, ESQ., 1654 School Street, Chicago, Ill.

Dear Sir:

In reply to your request, dated October 9, 1913, for an opinion as to whether or not the American Factory Company's Sales Cards are gambling devices, we wish to state that like sales devices are commonly called "punch cards." This specific sales card may be described as follows:

It has 603 numbers. The customer at a retail store punches one of the numbers through and obtains a prize number for which he pays ten cents. The prizes are as follows: Two 4-lb. boxes of chocolates valued at \$3.00 each, twelve 1-lb. boxes of chocolates at 60c each, twenty-four $\frac{1}{2}$ -lb. boxes of chocolates at 30c each, twenty-four propeller pencils at 25c each, 240 packages of gum at 5c each, 300 fancy pictures at 10c each, and one prize graphophone valued at \$16.10.

When one of the openings is punched through, the customer receives one of the above prizes, and when all the num-

bers are drawn, one of the said numbers in addition to the ordinary drawing calls for the grand prize, which is the graphophone mentioned above. The combined value of these prizes is \$84.50. The total cost price to the consumer is \$60.00.

We wish to state that the above is a violation of Sections 126, 127 and 180, Chapter 38, Hurd's Revised Statutes (Criminal Code) and also of Section 980 of the Chicago Code of 1911 forbidding persons to have possession of gambling devices and of Section 985 of the same in reference to lotteries and policy games. The validity of these statutes and ordinances have been repeatedly upheld by our courts in decisions too numerous to enumerate.

Any transaction which involves a chance, a consideration and a prize has been held to be a gaming transaction. The above described punch card contains all these elements and its use is therefore gaming.

The following decisions, which are also in point, are taken from Vol. IV of Words and Phrases, pages 3024, 3028 and 3029:

“GAMBLING—GAMING.

Whenever money or other valuable thing is hazarded and may be lost, or more than the value obtained, and depended upon chance, the transaction is gambling. *State v. Smith*, 10 Tenn. (2 Yerg.) 272, 281.”

“SELLING PRIZE PACKAGES.

The selling of prize candy packages in which a certain amount was put, at risk on the chance of getting more or less than its value, is gaming. *Eubanks v. State*, 50 Tenn. (3 Heisk.) 488, 490 (citing *Bell v. State*, 37 Tenn. 5 Sneed 407).”

“GAMBLING DEVICE.

A gambling device is defined to be anything which is used as a means of playing for money or other thing of value, so that the result depends more largely on chance than skill. *In re Lee Tong* (U. S.), 18 Fed. 253, 257.”

Therefore, in view of the law as stated, we are of the opinion that the use of these American Factory Company's sales cards is a violation of both the Illinois statutes and the Chicago Code forbidding gaming, and these sales cards partake both of the nature of a gambling device and of a

lottery and their use should be discontinued and the device wherever found should be destroyed by the authorities under the police power.

Yours very truly,
M. W. CAGNEY,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 10, 1913.

HON. ALBERT J. FISHER, Chairman, Committee on Local Industries.

Dear Sir:

Your committee at its last meeting asked this department, through me, for a report concerning encroachments by the Chicago and Western Indiana Railroad Company upon streets and alleys.

In compliance with said request we wish to call your attention to the report of your committee of December 9, 1912, which is largely based upon the investigation made by this department and embodied in our report to you of July 12, 1912, and in which the encroachments are outlined in a general way. (C. P., pp. 2619-23.)

It should be premised that at the meeting of the City Council held November 18, 1912, there had been introduced an ordinance amending an ordinance passed October 23, 1899, requiring the elevation of the tracks of the Pittsburgh, Fort Wayne and Chicago Railroad Company, etc., between 72nd street and 21st street. (C. P., p. 2252.)

This ordinance included the Chicago and Western Indiana Railroad Company, and under the terms of said ordinance the railroad company claimed every foot of ground between 23rd and 29th streets, including streets and alleys to the east line of South Canal street, as part of its right of way.

As a matter of fact all of the property had been scheduled by said corporation as right of way, for purposes of taxation.

Nevertheless, this ordinance did not pass in the form in which it was presented, but as the records show it was referred to your committee and worked out as an original ordinance which stands as a model for similar measures that may be presented for the consideration of the City Council in the future.

Meanwhile an appropriation was obtained of \$22,500 to begin a system of surveys of the rights of way of railroad companies and for other purposes.

The surveying division was duly created and as one of its first results the Chicago and Western Indiana Railroad Company, in the ordinance passed in the forepart of this year and within the life of the present council, paid to the City of Chicago the sum of \$54,270 for street and alley vacations between 23rd and 29th streets east of Canal street.

This is the first instance in the history of track elevation ordinances in this city that the narrowing of streets or for that matter the vacation of streets and alleys, was ever given this consideration.

Other encroachments between Polk and 15th streets are along both sides of its terminal station where platforms extend upon Plymouth place and Federal place, also in Federal place between Taylor and 12th streets. All these and the encroachments in Federal place between 12th and 14th streets and in Dearborn street between 14th and 15th streets, will be found in the report of your committee of December 9, 1912.

Tracks not authorized by ordinance are also laid in West 19th street in close proximity of the river.

In the Town of Lake we call your attention to parts of numerous east and west streets and alleys and to certain alleys running north and south adjoining their elevated structure between 40th and 42nd streets. It will be remembered that the company claims rights in all public property automatically as soon as it acquires the co-extensive private titles, under the ordinance of October 23, 1899. This department does not agree with that contention and the company failed to insist upon it in the case of the ordinance already referred to herein.

South of 47th streets we call attention to the present condition of South Canal street, for at least one-half mile. In-

stead of a street we find an unsightly and unsanitary ditch which is rapidly undergoing a course in benevolent assimilation.

These latter territories are now being surveyed and we trust that complete data will soon be ready for submission to your committee.

Respectfully submitted,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 10, 1913.

HON. CHARLES TWIGG, Chairman, Sub-Committee of the Committee on Gas, Oil and Electric Light.

Dear Sir:

Prior to September 29th, last, you left with this department a copy of the following motion theretofore passed by the Committee on Gas, Oil and Electric Light:

“Moved that the matter of the legal rights of the A. T. & T. Company be referred to the sub-committee now having under consideration the ‘Stock Quotation Telegraph Ordinance,’ with a request to secure an opinion from the Corporation Counsel on the right of this company to operate and with instructions to devise a system of public regulation and compensation for this company.”

Under date of September 29th we wrote you to the effect that we had been unable to obtain any reliable information as to the nature and extent of the operations, if any, of the above mentioned company in the City of Chicago, and that we were not in the position to give the opinion requested until your committee should furnish us with information disclosing the nature and extent of the company’s operations in Chicago.

On November 4th, Mr. Charles D. W. Cole of New York, general attorney of the American Telephone and Telegraph Company, appeared before your sub-committee and read and delivered to said sub-committee a written statement (which you have transmitted to us) in which after giving what Mr.

Cole refers to as a "brief history and statement of what the American Company has been and is doing in connection with the operation of long distance telephone lines," Mr. Cole states that about three or four years ago the American Company sold to the Chicago Telephone Company

"all the lines within the limits of the city which had been built by or stood in the name of the latter company (referring to the American Telephone and Telegraph Company); so that ever since that time all of the plant located in the streets of Chicago and used in furnishing long distance service over the lines of the American company has been the property of the Chicago company."

The statement further says that until recently the American Telephone and Telegraph Company owned certain equipment installed in an operating station known as the Morrell Park operating station (located at Kedzie avenue and 47th street) and also certain equipment located in the toll building on Franklin street near Washington street, and also that until recently said American Company employed certain operators in Chicago in addition to those employed by the Chicago Telephone Company.

The statement further says that since the "pending question" arose with the Local Transportation Committee the Chicago Telephone Company has purchased all the equipment of the American Telephone and Telegraph Company in Chicago and furnishes all the operators for the long distance business.

Mr. Cole's statement concludes as follows:

"Having in mind also the desirability of removing every possible question as to the legality of our practices, in view of the pending investigation, we decided to make this arrangement, and the situation now is that the Chicago Company owns all the property employed in the long distance service in, out of, and through Chicago, employs all the operators, and the American Company is in no sense operating in your city."

We understand that you desire us to assume for the purposes of this opinion that the facts are as stated in Mr. Cole's written communication to your sub-committee.

It appears therefrom that the American Telephone and Telegraph Company now has no poles, wires or equipment

in any of the streets of the City of Chicago and that it does not own any equipment within the city and that it employs no operators in Chicago, and that all of the property employed in the long distance service in, out of, and through Chicago is owned by the Chicago Telephone Company and that all the operators handling such long distance service in Chicago are employed by the Chicago Telephone Company.

The American Telephone and Telegraph Company would have no right to use the streets of the City of Chicago for its poles or wires without the consent of the corporate authorities of the city. If the company was so using the streets the city could impose and collect reasonable charges in the nature of a rental for the exclusive use of the parts of the streets occupied by the poles and could also impose upon the company charges in the nature of a license fee for regulation or supervision.

Springfield v. Postal Telegraph Company, 253 Ill. 346.

Any right on the part of the city to regulate the American Telephone and Telegraph Company or to exact compensation from it would have to be based upon a user of the streets of the city by the company.

Assuming that the facts are as stated in Mr. Cole's statement, it appearing from said statement that the company has no poles, lines or equipment in the streets of Chicago, or elsewhere in the City of Chicago, and that the long distance messages within the City of Chicago are carried over lines and equipment belonging to the Chicago Telephone Company and are handled by operators of the latter company, we are of the opinion that no basis exists for the regulation of the American Telephone and Telegraph Company by the City of Chicago or for the exaction of compensation from said company by the city.

Yours very truly,
BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

(Our letter to you of September 29, 1913, on subject-matter, and Mr. Cole's statement are returned herewith.)

NOVEMBER 10, 1913.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir :

Pursuant to a consultation held this afternoon with representatives of the traction surface lines, the city representative on the board of supervising engineers and yourself, there has been brought up for the opinion of this department certain amendments to an ordinance providing for the unification of surface street railways, recommended for passage by the Committee on Local Transportation Monday, October 27, 1913. The amendments and consideration thereof I will consider *seriatim*:

1st: An amendment to clause b, Section 1 of the ordinance which provides in effect that the board of supervising engineers shall be the same board as constituted under the 1907 ordinances. This amendment is proposed for the purpose of removing any ambiguity as to whether the original board under the 1907 ordinance or the boards constituted under the Calumet & South Chicago and Chicago & Southern Traction Company ordinances was referred to. There is no objection to this amendment.

2nd: Paragraph 1 of the same section provides that the rules adopted for the transfer of passengers to prevent fraudulent use thereof shall be subject to the approval of the board of supervising engineers. There is no objection to this amendment.

3rd: An amendment is proposed amplifying the language at the conclusion of Section 2 by making the modification, if any, in the present ordinance modifications "expressly or by necessary implication." The language already implied, used in Section 2 in our opinion covers the ground thoroughly but there is no objection to the amendment.

4th: In the eleventh line of Section 3 a similar modification is made with the same effect. We find no objections thereto.

5th: A provision is inserted in Section 3 after the word "ordinance" in the twelfth line thereof as follows:

"Subject to such revision as the board of supervis-

ing engineers may from time to time prescribe to carry out the provisions of said ordinances, provided that the distribution in the accounts of the companies of the cost of purchased power shall continue as heretofore; and the board of supervising engineers shall hereafter have the power (when and to the extent the board deems it proper) to require the respective companies to increase the monthly payments into their respective funds for renewals and depreciation (provided for in the traction ordinances), up to ten (10) per cent. of the gross receipts of the respective companies for such months respectively; but nothing in this section contained shall be construed as curtailing in any manner the obligations of the companies, or the power of the board of supervising engineers, under the existing traction ordinances with respect to expenditures and reserve funds whether for maintenance and repairs, or for renewals, and depreciation."

The effect of this amendment is to permit the increase of the payments into the renewal and depreciation funds up to ten per cent. of the gross receipts. The city representative of the board of supervising engineers has personally assured the writer (to be supplemented by a report to the same effect to your committee) that this is a beneficial provision from the city standpoint. As an accounting provision it is not properly subject to comment from this department and constitutes a matter of policy for the City Council to pass upon.

Suffice it to say that it is a departure from the provisions of the ordinance of 1907 and one which in the opinion of the city representative of the board of supervising engineers is conducive to the city's interest from an accounting standpoint.

6th: In Section 3 the language is inserted similar to that hereinbefore referred to in point number 3 of this opinion and is unobjectionable.

7th: In Section 8 the language is inserted restricting the companies to the provisions of the 1907 ordinances with respect to bonding rails for purposes of uniform conductivity. There is no objection to this amendment.

8th: In Clause e of Section 8 the word "section" is inserted in place of "ordinance" in the third line of the clause, to which there is no objection, and at the end of said

clause is inserted an entirely new paragraph, Board of Electrolysis claims, a copy of which has been prepared by this department in conjunction with yourself, the board of supervising engineers and the companies, which meets with our approval.

9th: In Section 14 an amendment is inserted in the sixth line thereof that the companies shall not carry a certain class of passengers without the consent of the City Council and the company. This amendment is unobjectionable.

Language is inserted in this section with respect to the limits of the City of Chicago making the ordinance applicable to the future as well as to the present limits, to which amendment we take no exception.

10th: In paragraph 2 of Exhibit "a" (operating agreement) the word "modify" is limited by additional language such as has been hereinbefore referred to in point 3 in regard to which we have previously expressed our approval.

11th: We attach an amendment preserving the validity of the ordinance in the event that any section, etc., is declared invalid.

Yours respectfully,

JOHN W. BECKWITH,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

NOVEMBER 11, 1913.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO:

Gentlemen:

On November 10th, 1913, Your Honorable Body passed the following order:

"Whereas, Section 9 of paragraph 5 of an agreement for unified operation of surface street railways in Chicago, published on page 8 of the Pamphlet printed by order of the Chairman of the Committee on Local Transportation, authorizes the Board of Operation to appoint an Executive Officer who shall have authority to employ, suspend and discharge all employes engaged in operation and management of the Chicago Surface lines; and

Whereas, In paragraph 6 of said agreement it is provided that the Board of Operation, in its discretion, may contract for a fixed term of service with any officer or employee, but not for a longer period than three years; and

Whereas, The creation of such a board, with its enormous powers, is creating alarm among the employees of the various railway companies; therefore, be it

Ordered, That the Corporation Counsel be and he is hereby directed to report to this Council at its next meeting as to the status of the Board of Operation as provided in paragraphs 5 and 6 regarding the existing wage scale agreement between the Chicago City Railway Company, the Chicago Railways Company and the employees of said companies."

Section 9 of paragraph 5 in the order referred to, provides as follows:

"Section 9. Executive Officer.

The Board of Operation shall appoint an executive officer with such title as shall be determined by it and who shall hold office during the existence of the Board of Operation appointing him. The executive officer shall have charge of the management and operation of all of the properties of the Companies under this agreement, subject to the approval of the Board of Operation. He shall have authority to employ, suspend and discharge all employees engaged in the operation and management of the Chicago Surface Lines; except officers appointed by the Board of Operation and heads of departments, who are also officers appointed by the Board of Operation. The executive officer from time to time shall define and prescribe the duties of all of the heads of department and all employees engaged in the operation and management of the properties.

Such executive officer shall be vested with such other powers and shall perform such other and additional duties as may be conferred and prescribed from time to time by the Board of Operation. In case of a vacancy in the office of the executive officer for any cause, his successor shall be appointed by the Board of Operation for the remainder of the term."

Paragraph 6 of the before-mentioned operating agreement, attached to and made a part of the ordinance authorizing unified operation of the surface street railways in the

City of Chicago, recommended for passage by the Committee on Local Transportation on October 27th, 1913, is as follows:

“Paragraph Six.

Terms of Office and Employment of Officers and Employees.

All officers—other than the executive officer, the chairman of the Board of Operation and the chairman of the Executive Committee—shall hold office for such period as shall be determined by the Board of Operation or during the pleasure of such Board. The Board of Operation may, however, in its discretion, contract for a fixed term of service with any officer or employe, but not for a longer period than three years.”

Before taking up for discussion the provisions of the paragraphs hereinbefore noted, I will advert to the general situation with respect to the contract now existing between the surface street railways and their employes.

In 1912, after a period of considerable unrest on the part of the employes of the traction companies and numerous preliminary attempts to settle the wage and other questions then in dispute, the companies and their employes agreed to submit the entire matter of wages and (to a certain extent) working conditions to a board of arbitration, one member whereof should be appointed by the companies, one member by the employes and the two so chosen to choose the third. The companies nominated Mr. Fleming as their representative, the employes nominated Judge Scanlan of the Circuit Court and the two so chosen nominated and elected Judge Carter of the State Supreme Court. The board of arbitration thus selected proceeded to hear the various contentions of the parties at length and made certain findings concerning such contentions. These findings, while not unanimously as all cases, were eventually accepted by the companies and their employes and made the basis of contracts between the companies and their employes in 1912, which contracts, or general agreements, by the terms thereof terminate in August, 1915. These contracts, so far as we are advised, have been universally accepted by all the employes and companies and have been lived up to and fulfilled up to the present time and are still in full force and effect. The details of the contracts or agreements and the scheme of

arbitration being of an exceedingly complex nature, we do not undertake in this opinion to set out more than a brief outline thereof, but for your further information attach copies.

In summing up the arbitrations and agreements reached in pursuance thereof, we may assume that binding contracts or agreements were entered into between the companies and their employes extending for a term ending August, 1915.

The question then arises (and it has been propounded by Your Honorable Body) whether these agreements or contracts will be abrogated and annulled or modified by the terms of the operating agreement hereinbefore quoted.

Section 9 in effect places the ultimate control of the operation and management of all the properties of the companies in an executive officer who shall have the authority to employ, suspend and discharge all employes engaged in operation and management of the Chicago Surface lines with certain exceptions which need not here be considered. The executive officer is vested with all the powers of the Board of Operation and this Board is, by the terms of paragraph 5 of the operating agreement, given the powers of the various directorates of the companies.

Admitting the conclusion stated in the resolution of Your Honorable Body that the Board is vested with "enormous powers", these powers are no different and no greater than the powers conferred upon the officers and directors of corporations organized under the general corporation act of the State.

The design of the operating agreement hereinbefore referred to is the unification of management, or as it might be expressed, a condensation of executive control placing the management of all the companies in a Board of a smaller constituency than the Boards of Directors of the several companies and further condensing the management in the hands of an executive officer who is practically to be the Chairman of the executive committee. These provisions and prospective corporate arrangements are made with a view to simplifying the control of the four surface street railway companies. But there must be read into any such arrangement all contracts or agreements heretofore entered into by the respective compa-

nies with third parties. It is too axiomatic to require citation of authority that a contract between two parties cannot be varied by one of the parties without the consent of the other party, and in the present instance the employes of the companies are not a party to the ordinance or operating agreement now pending before Your Honorable Body for consideration. While the various controlling officers of the corporations are merged for the purpose of unified control, each of the corporations retains its separate entity and continues to perform its corporate functions, and as a separate corporation, despite the unified ordinance and operating agreement, is subject to any action at law which might be brought for violation of a contract.

The employes of the companies having entered into a contract with the companies before the passage of the ordinance and operating agreement, continued to be bound by such contract and the corporations themselves on the other hand, are equally bound by the terms of such contracts. In my opinion, the contracts could be enforced by the employes if violated, in a court of law, notwithstanding any of the provisions of the paragraphs in your resolution referred to.

In passing we will say that while we have considered the question particularly with a view to the paragraphs of the operating agreement referred to in your resolution, our remarks may be construed as applicable to any language contained in the ordinance or the entire operating agreement with respect to any violation of contracts heretofore entered into by the employes and the several and respective companies.

The companies would no more be at liberty to violate the provisions of these agreements or contracts than they would be to violate the terms of their respective leases for offices in buildings occupied by them for such purposes, nor to abrogate the contracts for fuel and supplies theretofore entered into by them with third parties. The executive officer has the same and no greater powers with respect to the employes under the contracts or agreements hereinbefore mentioned than did the respective presidents and boards of directors of the several companies.

A familiar instance may be cited as illustrative of the sit-

uation before us, wherein a partnership or association of co-tenants leases property for a term of years and subsequently the interests of the lessor or lessors are transferred to and merged in a corporation with the control in the president and board of directors instead of in the co-tenants or co-partners. The contracts of lease with the tenants of the property remain unchanged despite and notwithstanding the corporate change in the lessor and the lessor would be obliged to carry out any such contracts which his predecessor in interest had made.

In conclusion we call attention to the fact that the city, technically speaking, had no part in the arrangement made between the several companies and their employes and it was not a party to any of the contracts entered into between such parties. It will be entirely beyond the power of either the companies or the city to enter into any contract which would abrogate, annul or modify any such contracts entered into between these corporations and their employes.

Respectfully submitted,

JOHN W. BECKWITH,

First Assistant Corporation Counsel,

Approved:

WM. H. SEXTON,

Corporation Counsel.

NOVEMBER 11, 1913.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation, City of Chicago:

Dear Sir:

In your letter of October 30th, 1913, you request an opinion "as to what is the procedure for the city to follow to secure compliance with the 1907 ordinance provisions and who is the authority to see to their enforcement." Replying thereto we have to say:

1. Section 32 of the ordinance to the Chicago Railways Company and Section 31 of the ordinance to the Chicago City Railway Company are in part as follows:

"The company further agrees that in the event that it shall make default in the observance or performance of any of the agreements or conditions herein required to be kept and performed by it * * * and if any such de-

fault shall continue for a period of three (3) months (exclusive of all times during which the company may be delayed or interfered with, without its connivance, by unavoidable accidents, labor strikes or the orders of judgments of any court entered in any suit brought without its connivance), after written notice thereof to it from the said city, then and in each and every such case, the said city by its city Council shall be entitled to declare this grant and all of the rights and privileges of the Company to maintain and operate street railways in any of the streets or public ways of the said city to be forfeited and at an end;''

Under the foregoing provision the city has the right to terminate the grants to the Companies upon breach of a condition without even a judicial determination of the breach.

Dillon on Mun. Corp. (Vol. III, Sec. 1231, 5th Ed. p. 1960).

Plymouth v. Chestnut Hill and N. R. Co., 168 Pa. 181.

Minersville v. Schuylkill Elect. R. Co., 205 Pa. 394.

Belleville v. Citizens' Horse R. Co., 152 Ill. 171.

Union St. R. Co. v. Saginaw Cir. Judge, 113 Mich. 694.

Tower v. Tower & S. T. R. Co., 68 Minn. 500.

The ordinances for the extensions in Harrison street from Forty-eighth avenue to Sixtieth avenue and in Fullerton avenue from Fortieth avenue to Forty-eighth avenue have been accepted by the Chicago Railways Company. Both ordinances provide that the extensions therein named shall be equipped and in operation not later than December 31, 1913. If these extensions are not completed by that time there will be a clear breach on the part of the Traction Company and the City Council will have the power to invoke the forfeiture provisions of the ordinance of February 11, 1907.

2. The following extensions are to be constructed under the compulsory extension provisions of the ordinance of February 11, 1907, for the calendar year 1913:

Armitage avenue from Forty-eighth avenue to Grand avenue.

Belmont avenue from Milwaukee avenue to Fortieth avenue.

Division street from Grand avenue to Forty-eighth avenue.

Western avenue from Lawrence avenue to Bryn Mawr avenue.

Section 3 of the ordinance to the Chicago Railways Company, which relates to compulsory extensions, provides as follows:

“The company shall, however, upon the *order of the City Council of the city*, construct, equip and operate such extensions of its street railway system in addition to those hereinabove provided for as may be required by the City Council subject to the conditions and limitations contained in section 26 of this ordinance.”

Under the above provision, as you will observe, it is expressly provided that the compulsory extensions are to be constructed “*upon the order of the City Council of the city.*”

Our investigation discloses that the City Council has never ordered the Chicago Railways Company to construct these extensions. Before the Company can be required to construct these extensions it will be necessary for the City Council to first pass an order to this effect.

3. The extensions in Elston avenue from Montrose avenue to Lawrence avenue and in Robey street from Forty-seventh street to Sixty-ninth street are also required to be constructed under the compulsory extension clauses of the Traction ordinances of 1907 to the Chicago Railways Company and to the Chicago City Railway Company, respectively. The ordinances covering these extensions are to be complete and in operation by December 31, 1913.

The City Council has formally ordered the construction of these extensions in accordance with Section 3 of the Traction Ordinances, above referred to. Should the companies fail to construct these extensions within the time designated in the ordinances providing for same, there will be a breach on the part of the companies. The city will then have the right to invoke the forfeiture provisions hereinbefore referred to.

4. The extension in Ashland avenue from Belmont avenue to Fullerton avenue is contained in Exhibit “A” of the ordinance to the Chicago Railways Company dated February 11, 1907. Frontage consents for this extension were not on file on February 11, 1907, but they have since been secured.

We believe that an order should be passed by the City

Council calling the attention of the company to its failure to construct this extension and directing that the same be constructed within a reasonable time. Should the extension then not be constructed within the time named in such order, the company will be in default.

5. What we said in regard to the extension on Ashland avenue from Belmont avenue to Fullerton avenue, also applies to the extension in Milwaukee avenue from Lawrence avenue to the city limits. This extension was authorized in the ordinance of October 10, 1910, on which date frontage consents for the extension were not yet on file; they have since been secured.

6. The extension in Western avenue from Bryn Mawr avenue to the city limits is to be constructed as part of the compulsory extensions for the year 1915. The City Council has not ordered the construction of this extension in compliance with Section 3 of the ordinance of February 11, 1907, aforesaid. An order should, therefore, be passed by the City Council requiring said extension to be constructed as part of the compulsory extensions for the calendar year 1915.

Respectfully submitted,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

NOVEMBER 11, 1913.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

Your letter asking whether the federal income tax applies to funds of the Board of Education, the Public Library and the Municipal Tuberculosis Sanitarium, received.

You are advised that these funds are not subject to the federal income tax. In the first place, they are funds derived from the exercise of an essential governmental function and in the second place, all three funds would come under the exemption provided for in paragraph (a) of clause G of the income tax section exempting "any corporation or association

organized and operated exclusively for religious, charitable, scientific or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual."

The opinion which we rendered you on October 31, 1913, in regard to a number of other funds applies also to these funds.

We are enclosing a copy of an opinion we are rendering today to the City Treasurer upon a similar matter.

Respectfully yours,

CRAWFORD ROSS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

NOVEMBER 11, 1913.

HON. M. J. FLYNN, City Treasurer.

Dear Sir:

Your communication of October 31, 1913, requesting an opinion as to the effect of the federal income tax provisions of the new tariff law upon funds in your hands as treasurer for the various pension funds received. It appears that these pension funds are as follows:

Firemen's Pension Fund.

Public Library Employees' Pension Fund.

Municipal Pension Fund of Chicago.

House of Correction Employees' Pension Fund.

Public School Teachers' Pension and Retirement Fund.

Public School Employees' Pension Fund.

Each of these funds is created by a separate statute, the legislature in each case either establishing the fund or making it the duty of the city or the school board or the public library board to do so, and setting forth with considerable detail the method in which the fund shall be collected, managed and distributed. In each of these funds the city treasurer is made by statute the custodian thereof. In some cases the fund is to be raised by the city turning over a certain percentage of its income received from designated sources,

while in others it is to arise from a certain deduction from the salaries of the employes to be benefited by the fund. The object of all these funds is to provide pensions for employes who have served for long periods of time, and have become disabled or superannuated, and in some cases to widows, orphans and dependent parents of deceased employes.

I understand that most of the securities in which the funds mentioned are invested, consist of United States bonds, bonds of the State of Illinois and bonds of the municipal corporations. The interest on all of these is exempt from the federal income tax by virtue of the wording of the act and also for further reasons set forth in our opinion to the comptroller.

It seems, however, that some of the funds are invested in bonds of railroad companies and other private corporations, and that you wish particularly to be advised as to whether or not the interest received upon these bonds is liable to federal income tax.

In paragraph (a) of clause G of Section 2 of the tariff law is provided, "that there shall not be taxed under this section any income derived from any public utility or from the exercise of an essential governmental function accruing to any state, territory or the District of Columbia or any political subdivision of a state." The pension funds in question consist of portions of the public revenue and of sums contributed by public employes in pursuance of the various acts establishing the funds. The establishing of pensions and raising of money to provide for the same are essential governmental functions which have been recognized as such for centuries. Under the terms of the act these funds are therefore exempt from the federal income tax and it is immaterial as to the nature of the bonds in which they are invested.

As the object and general result of the establishment of these pension funds is to increase efficiency in public service an interference with them by federal income tax would, in our opinion, be such an interference with an instrumentality of the state that it would make any such tax unconstitutional under the rule laid down in *Pollock v. Farmers' Land and*

Trust Company, 157 U. S. 429, the case in which the federal income tax law of 1894 was declared unconstitutional.

We are enclosing herewith copies of our opinions of October 31 and November 11, 1913, to the comptroller in regard to the effect of the federal income tax and its effect upon the city funds. These opinions apply to you as well as to the comptroller.

Respectfully yours,
CRAWFORD ROSS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 13, 1913.

TO THE HONORABLE, THE CITY COUNCIL, OF THE CITY OF
CHICAGO.

Gentlemen:

On November 3, 1913, your honorable body passed an order directing the Corporation Counsel to prepare and submit to you an ordinance requiring every physician and surgeon practicing within the City of Chicago to keep a register giving the names and addresses of all persons that apply to him or her for medical or surgical advice or assistance or receive such advice or assistance, and the disease or treatment applied for or given. (See page 2457, Council Proceedings of November 3, 1913.)

Manifestly an ordinance such as is required in the order referred to would serve no useful purpose unless the register were open to inspection. The law zealously guards communications from patient to physician and unless the disease is of such character that a quarantine would be justified, the physician or surgeon may refuse to give information as to the nature of his patient's ailment. (26 Cyc. 333.)

We are therefore of the opinion that the City Council

has no power to pass an ordinance such as is contemplated in your order.

Respectfully submitted,
JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 13, 1913.

HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

Under date of October 29, 1913, this department received two communications signed by Major M. L. C. Funkhouser, second deputy superintendent of police, inquiring: (1) whether the assistant inspectors of morals have lawful authority to arrest citizens violating city ordinances or state laws; (2) whether the department inspector and the inspector of morals have lawful authority to arrest any member of the police force who is found violating either the ordinances of the city or the department rules.

Inasmuch as the questions are closely related we shall answer both these communications in this letter. Section 12 of Article VI of the Cities and Villages Act provides:

“The trustees in villages, the mayor, aldermen and the marshal and his deputies, policemen and watchmen in cities, if any such be appointed, shall be conservators of the peace, and all officers created conservators of the peace by this act, or authorized by any ordinance, shall have power to arrest or cause to be arrested, with or without process, all persons who shall break the peace, or be found violating any ordinance of the city or village, or any criminal law of the state, commit for examination and, if necessary, detain such persons in custody over night or Sunday in the watch house or any other safe place, or until they can be brought before the proper magistrate, and shall have and exercise such other powers as conservators of the peace as the city council or board of trustees may prescribe. All warrants for the violation of ordinances, and all criminal warrants to whomsoever directed, may be served and executed within the corporate limits of any such city or village by any policeman of such city or village; such policemen being hereby clothed with all

the common law and statutory power of constables for such purposes." (See H. R. S., 1909, page 351.)

Neither the department inspector nor the inspector of morals nor the assistant inspectors of morals are designated as policemen or constitute any part of the police force of the City of Chicago, under the terms of the so-called ordinance for the reorganization of the police department, passed December 30, 1912. None of the officers above mentioned are given authority under any ordinance of the City of Chicago to arrest any person found violating any ordinance of the city or any criminal law of the state.

Under Section 1920 of the Chicago Code of 1911, you may, however, appoint all of the officers named as special policemen who will possess the same powers as the regular police patrolmen and will be subject to all rules and regulations governing the police force.

In that event, they may arrest citizens and members of the police force (including captains, lieutenants and sergeants of police), violating any ordinance of the city or criminal law of the state.

In no event, however, has any person, whether he be a member of the police force or a special policeman, authority to arrest any member of the police department found violating the rules of the department. The proper procedure in such case is to file charges with the Civil Service Commission.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 17, 1913.

HON. M. L. C. FUNKHOUSER, Second Deputy Superintendent of Police.

Dear Sir:

Answering your communication in which you ask for an opinion as to whether the City of Chicago would be less liable for damages in case of an accident to a pedestrian, vehicle,

etc., by one of the police department's automobiles operated by a policeman chauffeur possessing a state chauffeur's license, and in which you state that the policemen chauffeurs at present operating the department's machines do not possess a license, we beg to advise you as follows:

Under the law of this state the city is not liable for the negligent or tort acts of its agents when the agents are performing governmental functions such as police work and it would make no difference whether the chauffeur had a state license or not.

In *Wilcox v. City of Chicago*, 107 Ill. 334, the Supreme Court has stated the following principles:

"The Supreme Court of this state has the following to say, with reference to the above principles enumerated, that where a suit was brought to recover damages from injury sustained through the alleged neglect of a driver of a hook and ladder wagon belonging to the Fire Department and while said driver was engaged in the service of the city in saving property from destruction by fire, it was held that the members of the Fire Department, although appointed by the city, a corporation, are not servants and agents of the city, for whose conduct the city is liable, but they act rather as officers of the city, charged with public service, for whose negligence in the discharge of official duties, no action lies against the city unless it is expressly given in the maxim *respondeat superior*."

In the cases of *Culver v. City of Streator*, 130 Ill. 238, *Craig v. City of Charleston*, 180 Ill. 154, *City of Chicago v. Williams*, 182 Ill. 137, it was held that the city officers appointed or employed by the city are not agents or servants under the doctrine of *respondeat superior* so as to render the city responsible for their unlawful or negligent acts in the discharge of their duties.

In the performance of its police regulations the city can commit no wrong through its officers in such a way as to render it liable for their tort acts where the city is simply exercising its police powers. Acts of its officers or agents which are illegal or unlawful are *ultra vires* and a citizen has no remedy against a corporation for damages caused by such acts of its officers.

In short the automobile chauffeurs are engaged in executing, enforcing or giving effect to its police ordinances or regulations and thus discharge the governmental functions of the city and in such instances the city is not in anywise liable. *Caroline Tollefson, Admx., v. The City of Ottawa*, 228 Ill. 134.

We therefore advise you that it would make no difference whether the chauffeurs of the police department's automobiles secured state chauffeur licenses or not, as the city is not liable for damages for the negligent or tort acts of the drivers.

Yours very truly,

HARRY J. GANEY,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

NOVEMBER 17, 1913.

HON. JOHN E. TRAEGER, Comptroller.

Dear Sir:

On November 5, 1912, an election was held in the City of Chicago at which the people voted to fill a vacancy in the office of associate judge of the Municipal Court of Chicago caused by the death of the Honorable Max Eberhardt.

A question arose as to the regularity of the election for that office and, on November 26th, demand was made by Joseph E. Ryan on the canvassing board to certify the returns of the votes cast for that office which the board of canvassers refused to do.

A petition for mandamus was thereupon filed in the Circuit Court of Cook County to compel the canvassing board to perform its duty in that regard and on January 30, 1913, an order was entered by Judge Mangan commanding the said board to declare the result of the election. Thereafter a commission was issued to Joseph E. Ryan by the Governor, and on February 5, 1913, he began his duties as associate judge of the Municipal Court of Chicago.

The question involved is whether Joseph E. Ryan is entitled to the emoluments of his office prior to the time he be-

gan acting as judge. Section 9 of the act entitled, "An Act in relation to a municipal court in the City of Chicago," approved May 18, 1905, provides for the election of a chief justice and the associate judges of the Municipal Court, each of whom (except those elected in 1906) "* * * shall hold his office for the term of six (6) years and until his successor shall be elected and qualified. The judges so required to be elected shall enter upon the discharge of their duties on the first Monday of December following their election. Vacancies in the office of chief justice or associate judge of the Municipal Court shall be filled by election at the regular municipal, judicial or other general election which shall occur next after a period of sixty (60) days from the time such vacancies respectively occur, but where the unexpired term does not exceed one year, the vacancy shall be filled by appointment by the Governor."

It will be noted that in the case of an election to fill a vacancy no time is specified when the judge elected to fill a vacancy shall enter upon the discharge of his duties.

Mr. Mechem, in his work on Public Offices and Officers (Section 386) lays down the general rule that where no time is fixed for the beginning of a term of office it will begin on the date of election.

Section 29 of Article VI of the Constitution of this state provides, however, that all judicial officers shall be commissioned by the Governor and Section 11 of the Municipal Court Act referred to, provides that every judge of the Municipal Court before he enters upon the duties of his office shall take and subscribe the constitutional oath or affirmation. Are the Governor's commission and the taking of the oath prescribed conditions precedent to entitle a judge to his office?

Mayfield v. Moore, 53 Ill. 428, was an action brought by Mayfield to recover fees received by Moore as sheriff of Morgan County. Moore received a certificate of election and commission and entered upon and discharged the duties of the office from November 17, 1866, until January 13, 1868. Upon a contest it was declared that Mayfield was duly elected in November, 1866. On page 432, the court said:

"Under the law, so soon as a majority of the votes

were cast for appellant, at the election held in pursuance to law, he became legally and fully entitled to the office. The title was as complete then as it ever was, and no subsequent act lent the least force to the right to the place. The commission was evidence of the title, but not the title. The title was conferred by the people, and the evidence of the right by the law."

In *Kreitz v. Behrensmeyer*, 149 Ill., which was an action similar to the Mayfield case cited, the court on page 505 quotes with approval from that case and on page 503 says:

"Whilst it is true that in this state a public office is not a franchise or an incorporeal hereditament, but a mere public agency, created for the benefit of the state, yet the salary or emoluments annexed to a public office are incident to the right to the office, and not to the mere exercise of its duties or its occupancy."

While the present case may be distinguished somewhat from the cases cited, in that during the time for which Judge Ryan claims compensation, no person actually fulfilled the duties of the office so that the city received no benefit of services from a *de facto* officer, still, if the rule laid down in the cases cited is sound, it is broad enough to apply to this case.

In *Dillon on Municipal Corporations* (5th Ed.), Section 429, it is said:

"* * * It is also a general rule, asserted with practical unanimity, that if an officer of a municipal corporation who has been elected by the people for a specified term * * * be wrongfully removed * * * or otherwise wrongfully excluded from office, he may sue the corporation for the salary and prerequisites of the office, * * * during his wrongful exclusion, and he is entitled to recover, provided the city has not paid any other person for the performance of the duties of the office."

In *City v. Luthardt*, 191 Ill. 516, the court on page 523 quotes the following from *Andrews v. Portland*, 79 Me. 484:

"The legal right to the office carried with it the right to the salary or emoluments of the office. The salary follows the legal title. This doctrine is so generally held by the courts that authorities hardly need be cited."

The thought suggests itself, however, that a person might be elected to an office and refuse to qualify or through his own fault or neglect fail to qualify, in which event the office would

not be accepted and the person not entitled to the emoluments thereof until accepted.

Mr. Mechem, in his work referred to, says (Section 247) that acceptance is necessary to the full possession, enjoyment and responsibility of the office. This leads us to the conclusion that the rule laid down in the Illinois cases must be modified to the extent that no person is entitled to the emoluments of an office until he has accepted the same or at least has manifested his readiness and willingness to accept the same.

In this case, we believe that the demand upon the canvassing board to certify the result of the election constituted an offer to accept and fulfill the obligations of the office of associate justice of the Municipal Court, and having been unlawfully prevented from qualifying Judge Ryan is entitled to his salary from the date of his demand.

The fact that there is no appropriation from which Judge Ryan's salary for that time may be paid is immaterial. He is nevertheless entitled to compensation.

City v. Luthardt, 191 Ill. 516, 522.

Wagner v. St. Louis, 179 Mo. 495, 501.

The statute creates the office of associate justice of the Municipal Court and fixes the salary of that office. The duty of the council to appropriate funds for the payment of that salary is mandatory, and the City Council may be compelled to perform that duty. (26 Cyc. 266.)

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 17, 1913.

HON. JAMES S. McINERNEY, Prosecuting Attorney.

Dear Sir:

Your letter of recent date concerning arrests of chauffeurs employed by the Frank Parmelee Company was referred to the undersigned for an opinion. Besides your letter we have be-

fore us two letters from the attorney of this company in which the claim is put forth that the vehicles used by their operators do not at any time stand on public property to solicit business. On the other hand, it developed, on a hearing before a subcommittee of the Committee on Judiciary, which was considering the question of automobile and taxicab rates, that this company actually has public automobile licenses for their machines.

It seems that there were two arrests made. In one instance the charge is that the operator failed to have a rate card posted in the vehicle in accordance with Section 2572 of the Chicago Code of 1911, and in the other, that the name of the owner was not painted in full on the side of the vehicle as required by Section 2594.

We have made inquiry and have ascertained that in both instances the persons arrested were operating motor vehicles and not horse driven vehicles. This is an important point with reference to the first arrest, because Section 2572 relates only to horse driven vehicles, so that in any event this prosecution will not lie under that section even if the facts warranted prosecution under some other section of the Code.

Section 2572 is one of the sections coming under Article I of the Chapter on Vehicles. That article is headed, "Cabs, Carriages, Hacks and Omnibuses," and one of the sections of same requires licenses for this class of vehicles "or other vehicle of any description or name whatever drawn by one or more horses" which stand on cab stands or on the streets for employment. Clearly the requirements of Section 2572, which apply to vehicles "licensed under the provisions of this article" are not intended to include motor driven vehicles. If anything were necessary to clinch this view, it will be found in the fact that the rates of fare required to be posted are the rates for one and two horse vehicles set forth in Sections 2568 and 2569 and not the rates for motor vehicles, and the further fact that Section 2597 makes provisions for public motor vehicles almost exactly like those for public horse vehicles which appear in Section 2572. We have taken pains to point out these matters with great precision, because we do not wish to be understood as saying that under other condi-

tions, where the distinction is not so clearly drawn, the words "hack," "cab" or "carriage" may not be regarded as generic terms susceptible of a broader meaning than is given them in this section of the Code.

We take it therefore that the real question which you desire to have answered is whether Section 2597 (under which no prosecution was brought but which is similar to Section 2572) applies only to those motor vehicles designated in Section 2588 as public automobiles which stand upon public cab stands or public places soliciting patronage, or whether it applies to all automobiles operated for the conveyance of passengers for hire or reward. We will therefore consider this point first without reference to the fact that the Frank Parmelee Company has taken out licenses under Section 2588, and then pass on the question of whether the taking out of such licenses puts them in a different position.

Section 2597 is contained in Article II of the same chapter, which is headed "Public Automobiles for Passengers." The first section of this article (Section 2588) provides that no automobile, autocar or similar vehicle "which shall stand or be kept upon any public cab and hack stand or upon any street or public way in the city for employment" shall be operated unless licensed.

Following this are a number of sections which seem to be designed primarily to regulate this class of vehicles, although some of them contain provisions that are unquestionably applicable to vehicles not included within the terms of Section 2588. In all cases, however, where the words "licensed under the provisions of this article" appear as a limitation on the applicability of the requirement, they must be understood as referring particularly to automobiles and similar vehicles which are licensed to stand on public cab stands and public places awaiting employment.

Section 2597 requires that there shall be fixed on the inside of "every vehicle licensed under the provisions of this article" a card containing the owner's name, the number of the license, the whole of Section 2613 relating to rates of fare, and the whole of Sections 2605 and 2606 relating to the carriage of baggage and lost baggage. There can be no doubt

that this provision is limited to only such vehicles as stand on public cab stands and public places seeking employment. In fact, Section 2613 containing the rates of fare, which is required to be posted in such vehicles, contains a clause to the effect that it shall apply only to vehicles of the kind described in Section 2588, and it would therefore be absurd to hold that a section which has no application to any other kind of vehicles must be posted in vehicles which are not affected by it.

Consequently, if the Frank Parmelee Company had not taken out licenses for their machines under Section 2588, and did not operate them from public cab stands or public places, they would be exempt from the provisions of Section 2597.

But, inasmuch as this company has taken out licenses which entitle them to all the rights and privileges of public automobiles, we are constrained to hold that they must also conform to all the requirements prescribed by ordinance for such vehicles. It is true that the attorneys for the company stoutly maintain that they are not availing themselves of the privileges which they can claim under these licenses. Whether or not they are mistaken on this point we do not undertake to say, because that is purely a question of fact, and if it becomes necessary to determine this question it will have to be investigated by you. From information at hand it would appear to be doubtful whether the conduct of chauffeurs and others connected with the business is such as to bring them entirely outside of the classification of Section 2588 even if the possession of the licenses were not the determining factor.

The possession of the licenses in itself, in our opinion, is sufficient to bring the vehicles within the classification of Section 2588. Otherwise an operator could flash a license for purposes beneficial to him, and at the same time claim to be exempt from obligations imposed on him. In other words, the mere possession of the license entitles him to the privileges, and he must therefore submit to the duties imposed by law. You are not bound to inquire how far or to what extent he has availed himself of the privileges, but have a right to assume that he is what he purports to be.

Again, the mere declaration on the part of the person applying for the licenses, in our opinion, determines his status.

Thus, it was held that when a person took out a license as an innkeeper he could not evade responsibility under the innkeeper's act although his main business was keeping a restaurant.

"The main business of the defendant consisted in the keeping of a restaurant on the lower floor of a building occupied by him, one-half only of the third floor of which was devoted to lodgers. The entire business was carried on under a license entitling him to sell spirituous liquors upon the premises, obtained by him from the board of commissioners of excise of the City of New York, upon an affidavit in which he alleged that he kept an inn, and that an inn was necessary for the accommodation of travelers in the place where he kept it. (L. 1857, C. 628.) The plaintiff entered the restaurant of the defendant for the purpose of dining, and noticing hooks around the room, intended for the coats of guests, hung up his overcoat on one of them. After finishing dinner he went to get his overcoat, but it was gone, and was never recovered by him, or by the defendant, whom he immediately notified of its loss; and he thereupon brought an action to recover from the defendant the value of the overcoat. *Held*, that the defendant by his own act and declaration had established the fact that he kept an inn, and hence his liability to a party who lost property in the inn while there in the character of a guest necessarily attached, no matter how slight the entertainment might be, nor how temporary the use made of it; and the character of the plaintiff as guest was not affected by the circumstance that a friend paid for the dinner."

Kopper v. Willis, 9 Daly (N. Y., 1881) 460.

It may be said of the case from which we quote that there was some part of the defendant's premises devoted to purposes of an inn, but the analogy seems to be borne out in all respects, because there is at least as much of the character of a public automobile in this instance as there was of the character of an inn under the facts above cited. In any event the court expressly says (p. 464) that the place would not have been construed as an inn if it had not been for the owner's declaration.

Consequently the Frank Parmelee Company seems to be liable for a violation of Section 2597 of the Code, although not liable under Section 2572.

With regard to the prosecution under Section 2594, the

situation is exactly the same. The company is liable because it has taken out such licenses for the vehicles in question and it must be understood that it is operating them as public automobiles. This department on a former occasion held that where an automobile was operated as a livery vehicle and did not use the public cab and hack stands on the streets for soliciting business it was not required to have the name of the owner on the side of same. But this opinion does not apply where the vehicle is actually licensed as a public automobile under the classification set out in Section 2588.

The same reasoning that we have used concerning the liability of this company under Section 2597 applies also to its liability under Section 2594.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 20, 1913.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

In your letter of the 19th instant, you call attention to the fact that the ordinance passed November 13, 1913, authorizing unified operation of the street railways of the city, contains numerous prohibitions in reference to the use of transfers and fixes penalties for same, also to the fact that under the terms of the ordinance requiring acceptance by the companies, it may not go into effect until sixty days after its passage.

You next point to the section of the Cities and Villages Act which requires all ordinances imposing any penalty to be published within one month after passage, and deferring the time for taking effect until ten days after passage.

You ask two questions in regard to this ordinance, first, whether it comes within the class of penal ordinances requiring publication before they take effect, and second, if such publication is necessary, when shall it be done.

The ordinance in question undoubtedly imposes a penalty within the meaning of the statute requiring publication, and therefore must be published before such penalty can be enforced for a violation of same. It is true that the ordinance partakes of the nature of a contract, but there are penalties prescribed not only with relation to transfers, but other things as well, notably the provisions relating to the comfort of the public contained in Section 12. The statute does not draw a distinction between this class of ordinances and other ordinances imposing penalties in so far as publication is concerned. Consequently there is no reason for assuming that the publication required by statute may be avoided.

With regard to your second question, as to when such publication shall be made, we recommend that the same be done as soon as practicable, since the ordinance may be accepted sooner than is at present considered likely, and in such event it will go into effect at once if there has been due publication. Under the statute, it must be published within one month after its passage, the provision for same being that all such ordinances shall "within one month after they are passed, be published. * * *"

There would be no inconsistency in publishing the ordinance before it is accepted, and such a procedure would not conflict with the provisions of Section 15. That section, as you say, provides that the ordinance shall not take effect until after it has been accepted by the various street railway companies and gives them sixty days to accept it. But, on the other hand, your assumption that the statute requires all penal ordinances to take effect ten days after publication is erroneous.

The statute, on the particular point involved, makes use of the negative form of expression. It says that "no such ordinance shall take effect until ten days after it is so published." It does not follow that all such ordinances must take effect at the end of ten days in the face of express provisions in same stating when they are to go into effect. It is not unusual for an ordinance to be passed which provides that it shall not go into effect until a much later day, in some cases as much as six or nine months after passage. It is the

date of passage that determines when publication shall be made, and not the time of taking effect. Usually the time of taking effect is expressly stated. This must not be less than ten days after publication but it may be more.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

NOVEMBER 20, 1913.

HON. WILLIS O. NANCE, Alderman, Sixth Ward.

Dear Sir:

Your letter of the 12th instant requesting an opinion as to the validity of an ordinance prohibiting the distribution of handbills, etc., in the vestibules of houses and flat buildings, has been referred to me for reply.

I find upon investigation that various cities, among others, Portland, Oregon, Kansas City, and Philadelphia, have enacted ordinances similar in character to the one suggested by you.

Such an ordinance as you suggest must be based either upon the theory that the power of the city over its streets is broad enough to sustain the same or that it is a reasonable exercise of the police power.

The powers of the City Council over streets which could be fairly evoked here, as enumerated in Section 1 of Article V of the Cities and Villages Act, are as follows:

“Ninth. To regulate the use of the same.

Tenth. To prevent and remove encroachments or obstructions upon the same.

Twelfth. To provide for the cleansing of the same.

Fifteenth. To regulate and prevent the throwing or depositing of ashes, offal, dirt, garbage or any offensive matter in, and to prevent injury to any street, avenue, alley or public ground.

Seventeenth. To regulate and prevent the use of streets, sidewalks and public grounds for signs, sign posts, awnings, awning posts, telegraph poles, horse troughs, racks, posting handbills and advertisements.

Eighteenth. To regulate and prohibit the exhibition or carrying of banners, placards, advertisements or handbills in the streets or public grounds, or upon the sidewalks''

It must be noted that power in express terms is not given the City Council to prohibit the *distribution* of handbills on its streets, but that Clause 18, above quoted, refers only to the *exhibition or carrying* of handbills.

In *Anderson et al. v. State*, 96 N. W. Rep. (Iowa) 149, an ordinance declaring it to be unlawful for any person, firm or corporation to employ any boy, or other person, to circulate or distribute handbills, etc., upon any public street, alley, sidewalk or public grounds of the City of Omaha was sustained upon the theory that the city had express power to enact the same under power given it to regulate and prohibit "the distribution or posting of advertisements or handbills in the streets or public grounds, or upon the sidewalks."

In the case of *Philadelphia v. Brabender*, 201 Penn. 574 (58 L. R. A. 220), the court sustained an ordinance declaring it to be a nuisance

"to cast or place in the streets of the city, or on the footways thereof, or in the vestibules or yards or upon the porches of any dwellings or other buildings within the limits of the city any paper, advertisement, handbills, circulars or waste paper,"

exempting from its provisions newspapers and addressed envelopes.

The court adopted the opinion of the Superior Court, which says on pages 576 to 577:

"But it is claimed that, so far as the ordinance relates to the casting of advertisements, circulars, handbills and waste paper into the vestibules of dwellings, it is invalid, because, to adopt the language of counsel, it relates to that, which, at most, is a private nuisance; an act done within the house line and to which only the owners or occupiers can object. We do not understand it to be claimed, and we do not think it could be declared as an unvarying rule, that because an act, not a common nuisance *per se*, is done within the house line of private premises, it may not lawfully be prohibited by municipal ordinance. * * * But we do not regard this ordinance as intended for the protection of private property. Inci-

dentally it may have the effect of relieving such owners, to some extent, from what, in common parlance is a nuisance, but that is not its primary purpose. Waste paper, circulars, handbills and the like lying upon the porch, in the vestibule or in the front yard of a private residence are not sightly things, but so long as they lie there they cannot be considered a public nuisance, and, for the purposes of this case, it may be conceded that a city ordinance cannot make them such. It is obvious, however, that the reason upon which the ordinance rests is not merely that the casting of these fugitive papers in the places described is an annoyance to the owners of the premises, but that the wind catches them up and casts them into the streets, where they lie or are blown about, to the annoyance and inconvenience of the general public. This is liable to happen not only to papers cast into the yards and upon the porches, but also, although perhaps in a less degree, to those cast into the vestibules of city dwellings, as is well shown in Judge Biddle's opinion. It is a fact which did not require proof, but is a matter of common knowledge, which the municipal authorities in enacting the ordinance, and the court in passing upon its reasonableness were justified in taking into consideration."

In *People v. Horwitz*, 140 N. Y. Supp. 437 (1912), the court sustained the validity of an ordinance of the City of New York, which provides "that no person shall throw, cast or distribute in or upon any of the streets, avenues or public places, or in front yards or stoops any handbills, circulars, cards or other advertising matter whatsoever."

The power of the city to enact this ordinance was held to be derived from Sections 50 and 43 of the Greater New York charter, Section 50 providing that the board of aldermen shall have power, among other things, "to regulate the exhibition of advertisements or handbills along the streets," and Section 43 providing that the board of aldermen may pass ordinances deemed "necessary and proper for the good government, order, protection of persons and property, and for the preservation of the public health, peace and prosperity of said city and its inhabitants."

This case was decided in the City Magistrate's Court of New York City and the court says on page 442:

"The district attorney cites many authorities in sup-

port of the constitutionality of the ordinance in question, among them *City of Philadelphia v. Brabender*, 201 Pa. 574, 51 Atl. 374, 58 L. R. A. 220; *Wettengel v. City of Denver*, 20 Colo. 552, 39 Pac. 343, and *Anderson v. State*, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421.

These cases seem to hold that an ordinance like the one before me is a *bona fide* exercise of the police power, and it does not arbitrarily and unreasonably interfere with the rights of an individual under the guise of police regulation. They seem to argue that the natural and probable consequence of the placing of advertising matter in the hands of those who have no desire or use for them is to litter the streets and, probably, frighten horses thereon at the time.

I am not prepared to go as far as that and do not altogether agree with that reason as a sound foundation for the sustaining of an ordinance of this character. I would put the constitutionality of this ordinance on the ground that a municipality, through its legislative body, has the right to prohibit the use of the streets by persons for any purposes detrimental to the common good, or that may conflict or interfere with the rights of others in the enjoyment of the highways, which should be unincumbered and clean, so as to promote the safety, health and comfort of the public."

It must be noted that the above cases assign different reasons in sustaining the ordinances there in question and it is perhaps doubtful whether or not the courts of this state would reach such conclusion.

I am inclined to believe that the validity of such an ordinance would rest upon its reasonableness and I refrain from expressing an opinion as to whether or not such an ordinance could be sustained in this state.

Should you desire to have such an ordinance drafted, we will be pleased to prepare the same for you.

Very truly yours,
LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 21, 1913.

HON. JAMES F. BURNS, Chairman, Sub-Committee of Committee on Streets and Alleys.

Dear Sir:

Your letter of the 7th instant, requesting an opinion as to the validity of a proposed ordinance requiring pedestrians to cross streets at street intersections and imposing a penalty for non-compliance with same, has been referred to the undersigned for reply.

Among the powers of the City Council, under Article V, Chapter 24, Hurd's R. S., 1912 (Cities and Villages Act), with reference to streets, are the following:

Ninth. To regulate the use of the same.

Sixteenth. To provide for and regulate crosswalks *

* *

Twentieth. To regulate traffic * * *

Aside from these powers there are general powers granted to the city which should be taken into consideration and which undoubtedly give the city authority to enact an ordinance which has for its object the welfare and safety of the public.

Under these various powers, exclusive control over the streets is given to the city, and it may do anything with or allow any use of the streets not incompatible to the ends for which streets are established. (*City of Quincy v. Bull*, 106 Ill. 337; *People v. Blocki*, 203 Ill. 363, 369; *Elliott on Streets*, 3rd Edition, Section 505.) The exercise of these powers are, to a large extent, left to the discretion of the City Council. (*Farson v. Fogg*, 205 Ill. 326, 340, and cases there cited; *Dillon on Municipal Corporations*, 5th Edition, Section 1151.)

If perchance it should be argued that the specific powers with reference to the control of streets and traffic are not sufficient to warrant such a regulation as proposed, it seems that the question of the validity of the proposed ordinance would be governed by the law with reference to the general police powers delegated by the state to the city. Under such general powers the city may enact ordinances which would be conducive to the promotion of the health, safety and welfare of its inhabitants where the authority to do so may be fairly implied under the various grants of power. (*Gundling v. City*

of *Chicago*, 176 Ill. 340-348; *Spiegler v. City of Chicago*, 216 Ill. 114.) It is a familiar doctrine that an ordinance passed under such general powers as must be invoked in the present instance must be reasonable or it will be held void. The question of reasonableness in such case is one for the courts, and, in determining that question, the courts will have regard to all the existing circumstances or contemporaneous conditions, the objects sought to be obtained, and the necessity or want of necessity for its adoption. (*Hawes v. Chicago*, 158 Ill. 653; *Wice v. Chicago & N. W. Ry. Co.*, 193 Ill. 351.) .

Elliott on Streets and Roads, 3rd Edition, Section 542, in reference to police power, says:

“Under other special clauses in city charters, coupled with the ‘general welfare’ clause, it has been held that cities have the power to prohibit fast driving, prohibit the stopping of teams and carriages on crosswalks, to prohibit the leaving of horses in the streets and alleys, to regulate the speed of trains and, in short, to do almost anything proper or necessary to protect the public in the use of the streets.”

The above excerpt states the law with regard to the regulation of horses, vehicles and other means of travel on same besides pedestrians, but the very fact that the powers of the municipality in regard to these are so broad gives sanction to the exercise of similar powers in regard to pedestrians.

Arguments may be made that the use of the streets by pedestrians for public travel is one of the primary uses of same, and therefore the rights of pedestrians in this regard cannot be curtailed. We think that any question as to the interference with public rights to the use of the streets, by the contemplated ordinance, can be set at rest by a reference to the case of the *Cicero Lumber Company v. Cicero*, 176 Ill. 9. The contention here was made that a street set aside purely for boulevard purposes was a violation of the constitution, Article 2, Sections 2 and 13.

Our Supreme Court stated that:

“The plenary power of the legislature over streets and highways is such that it may, in the absence of special constitutional restrictions, vacate or discontinue them, * * * or invest municipal corporations with this authority.’ * * * While it is true that the public high-

ways are for the use of the general public, it is at the same time true that the legislature is a representative of the public at large. As such representative, it may grant the use or supervision and control over the highways to a municipal corporation, so long as the highways are not diverted to some use substantially different from that for which they were originally intended, * * *

And the court further says:

“ ‘So far as the existing public rights in these streets are concerned, such as the right of passage and travel over them as common highways, a little reflection will show that the legislature has supreme control over them. When no private interests are involved or invaded, the legislature may close a highway, and relinquish altogether its use by the public, or it may regulate such use, or restrict it to peculiar vehicles, or to the use of particular motive power. It may change one kind of use into another, so long as the property continues devoted to public use. What belongs to the public may be controlled and disposed of in any way which the public agent sees fit. *Chicago v. Rumsey*, 87 Ill. 348; *Chicago v. Union Bldg. Asso.*, 102 Ill. 379, 40 Am. Rep. 598. It is said by Dillon, in his work on Municipal Corporations, 4th Ed., Sec. 657: ‘As respects the public or municipalities, there is, in the absence of special constitutional restriction, no limit upon the power of the legislature as to the uses to which streets may be devoted.’ This court held to the same effect in *Meyer v. Teutopolis*, 131 Ill. 552; *True v. Davis*, 133 Ill. 552, 6 L. R. A. 266; *Barrows v. Sycamore*, 150 Ill. 588, 25 L. R. A. 535; *Simon v. Northup*, 27 Or. 487.’ ” * * *

Our Supreme Court further stated, in the case of *Har-der's Storage Co. v. Chicago*, 235 Ill. 58, at page 79, with reference to streets, as follows:

“In *City of St. Louis v. Green*, 7 Mo. App. 468, on page 475, the court said: ‘That the streets of the city are highways of the state, and therefore public roads, which every citizen has a right to use, is a valid argument against stopping or unreasonable hindering of travel over the streets, but it is no argument at all against subjecting travel over those streets to rules and regulations; and it is surely no argument against a regulation which the corporation has imposed by express permission of, and in virtue of a special grant of power from the legislature.’ ”
* * *

All the essential features of the very broad power of the

Legislature in regard to streets have been delegated to the City Council as indicated above; and therefore the quotations given above apply with equal force to ordinances relating to the use of streets, always provided that they are reasonable.

It is therefore our opinion that, testing the proposed ordinance in the light of the decisions heretofore rendered by our courts, the same would be held a valid enactment. In view of the specific powers with reference to the regulation and control of the streets as hereinabove enumerated, we have no doubt that said ordinance will be held reasonable. The reasonableness or necessity of such a law, considering modern conditions and the congestion of our streets within the limited area described, can be fully demonstrated.

Ordinances or road regulations, similar in effect to the proposed ordinance, are now in force in Boston, District of Columbia, Cincinnati, Cleveland and Los Angeles. Consequently, in case the ordinance in question is enacted we think the same will be sustained by our courts.

Yours very truly,

LOUIS SALINGER,
LEON HORNSTEIN,

Assistants Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 22, 1913.

HON. HUGO PITTE, Chairman, Committee on License.

Dear Sir:

On November 3rd, we received from Hon. Francis D. Connery, city clerk, a communication to the effect that your committee at its meeting held November 1, 1913, directed him to refer to this department for an opinion as to their validity and legal effect the following ordinances:

1st. An ordinance amending Article I of Chapter XLII of the Chicago Code of 1911 by adding thereto Sections 1529a and 1529b; and

2nd. An ordinance amending Article I of Chapter XLII

of the Chicago Code of 1911, by adding thereto Sections 1529a, 1529b and 1529c.

Both of said ordinances relate to the assignment of dramshop licenses and preference in renewal of such licenses.

It may be assumed, for the purposes of this opinion, that the General Assembly of the State of Illinois has conferred upon cities incorporated under the act of the legislature commonly known as the Cities and Villages Act, power to license, regulate and prohibit the selling or giving away of intoxicating liquor, and that such cities' power in respect to licensing, regulating and prohibiting the selling or giving away of intoxicating liquors within their territorial limits is without qualification or restriction except that in granting such licenses the corporate authorities shall comply with whatever general law of the State may be in force relative to the granting of licenses, and further, that there is no statute or general law of the State of Illinois which forbids such cities to make dramshop licenses transferable or assignable, and that the City of Chicago has the power to provide by ordinance that such licenses may be assigned or transferred upon such terms and conditions as the City Council may deem proper.

Each of the above mentioned ordinances provides that the owner of a license to keep a dramshop within the City of Chicago may transfer and assign such license, and that the assignee of such license shall not be obligated to pay any license fee for the unexpired portion of the period covered by the license so assigned which shall theretofore have been paid by the assignor, and that upon the filing of any such assignment with the city collector of the City of Chicago, and upon compliance by the assignee with all laws and ordinances governing persons applying for licenses to operate saloons or dramshops there shall be issued to the assignee named in such assignment a permit to use such assigned license for the unexpired portion of the period covered by the license so assigned.

This provision of the ordinances apparently contemplates the keeping and operating of a saloon by one person (the person to whom the permit shall be issued), under a license issued to another person (the licensee named in the

license), for a portion of the period for which the license was issued.

In the case of *Hoyt v. McLaughlin*, 250 Ill. 442, the Supreme Court found that McLaughlin was owning, maintaining and conducting a dramshop in the City of Chicago under a license issued to and in the name of one Grube and in respect to such situation said, page 450:

“It would seem too plain for debate that McLaughlin could not own, maintain and conduct a dramshop under a license issued to and in the name of another man.”

If the permit provided for in the ordinances should be considered as in effect a new license to the person to whom the permit was issued, granting to such person the right to keep a dramshop for the unexpired portion of the period for which the original license was issued, then the granting of such new license (permit) without the payment in advance to the City of Chicago of a license fee therefor of not less than at the rate of \$500.00 per annum would be in direct contravention of the provision of paragraph 3 of the Dramshop Act (Chapter 43, Hurd's Revised Statutes of Illinois), which is as follows:

“That hereafter it shall not be lawful for the corporate authorities of any city, town or village in this state, to grant a license for the keeping of a dramshop, except upon the payment, in advance, into the treasury of the city, town or village granting the license, such sum as may be determined by the respective authorities of such city, town or village, not less than at the rate of five hundred dollars (\$500) per annum. * * *”

For the reasons above stated, we are of the opinion that both of the above mentioned proposed ordinances would be invalid.

Yours respectfully,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

NOVEMBER 24, 1913.

BOARD OF TRUSTEES OF THE POLICE PENSION FUND OF THE CITY
OF CHICAGO.

Gentlemen:

In response to the recent communication from your secretary as to whether deductions should be made from the salaries of probationary officers, I beg to say that in my opinion this deduction should be made.

In an opinion to the general superintendent of police, of April 15, 1908, the writer thereof takes the position that the appointment as policeman is not complete until the expiration of the probationary period and hence probationary policemen are not members of the Police Department until the probationary period is terminated. With this opinion we cannot agree. So far as it is in variance with the views herein expressed, it is not regarded.

Policemen from the time they are appointed and sworn in are invested with full constabulary authority. The fact that their term of employment may be cut off at any time during the probationary six months does not alter the fact that they are in the enjoyment of full police powers while and so long as they continue to act as policemen. Any other conclusion would lead to an absurdity and would render the city liable for the tortious acts of these probationary officers. If probationary policemen are not policemen in the fullest sense of the term and fully members of the Police Department, they have no right to make arrests, apprehend criminals and do other police work assigned to them.

I am of the opinion that their one per cent. salary deductions should be made during the probationary period, and I may add, although possibly beyond the purview of your request, that the probationary period should be included in their twenty years service.

As the pension law of 1911 makes specific provision for these probationary officers, the views herein expressed are to be held to apply to deductions which should have been made

subsequent to 1908, up to 1911, when these deductions were resumed.

Yours respectfully,
 JOHN W. BECKWITH,
First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 25, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

We are in receipt of your communication of October 28th in respect to wines furnished by the Hotel Sherman in its banquet room on the third floor at the dances held there every Wednesday and Saturday evenings.

You make two queries: First, whether the ordering of wines before 1:00 o'clock a. m., to be served between 1:00 o'clock and 3:00 o'clock a. m., is not a punishable evasion of the law. Second, under what authority the Sherman House sells wines in the banquet room on the third floor unless it holds a license issued specifically for said room.

Section 1527 of the Chicago Code of 1911, after providing that the rooms or premises for which a saloon license is issued shall be upon the same floor and that no person shall sell or otherwise dispose of any intoxicating liquors at any place other than that specifically described in his license, whether such place be in the same building or not, proceeds as follows:

"Provided, nothing herein contained shall be so construed as to prevent any hotel from serving intoxicating or spirituous liquors of all kinds to its guests, on any floor of, or in any part of, such hotel, if such liquor so served shall be kept in and only served from a licensed bar or dramshop located in and conducted by said hotel. The foregoing provision shall apply only to hotels conducted and maintained as such. Nothing herein relating to hotels is to be construed as removing from the operation of this article any restaurant, lunch room, chop suey place or room, or any other public eating room or place; but none of the rooms or places mentioned shall serve, either with or without meals, any intoxicating or spirit-

uous liquors, except under a license obtained under and in compliance with the provisions of this article."

Three saloon licenses have been issued for premises in the Hotel Sherman, to wit: a license to Joseph Beifeld for the basement at northwest corner of Clark and Randolph streets (College Inn), a license to Franklin W. Bering for 114 West Randolph street (Celtic Bar) and a license to Ernest L. Beifeld for 168 North Clark street (Hotel Sherman Bar). We are informed that all of said three dramshops are conducted by the Hotel Sherman.

If the persons attending the dances are, in legal contemplation, guests of the hotel within the meaning of the term "guests" as used in the ordinance above quoted from, then the hotel would have the right under the ordinance to serve wine to such persons in the banquet room on the third floor, provided such wines were kept in and only served from one of the licensed bars located in and conducted by said hotel.

On the other hand, if such persons are not "guests" of the hotel as aforesaid, then the hotel has no right to serve them with wine on the third floor at any time without a dramshop license for some portion of the third floor, including the banquet room where the wines are served.

We are not definitely informed in regard to the dances in question, but understand in a general way that they are given by and under the auspices of the Hotel Sherman; that persons attending the dances are charged \$1.00 each, which is usually collected at the door as the person enters the banquet room. This charge entitles the person paying it to engage in dancing. Wine and food are furnished by the hotel in the banquet room upon order.

The adjudications of the question as to what is required to constitute a person a guest of a hotel have usually arisen in cases where it has been sought to hold the hotelkeeper liable for goods lost at the hotel under the common law liability of hotelkeepers, which makes them responsible for the goods of a guest lost in the hotel even though the same are lost without any negligence or fault on the part of the hotelkeeper.

It has been universally held that the loss of goods at a hotel does not of itself make the hotelkeeper liable but that

it must also be shown that the hotelkeeper was acting in the capacity of hotelkeeper when the goods were lost, and that the person whose goods were lost was at the hotel for purposes which the common law recognizes as the purposes for which inns are kept, namely, the accommodation and entertainment of travelers or transients, and not for some special purpose not connected with such kind of accommodation and entertainment.

Accordingly, it has been held that if a person comes to an inn on a special contract to board there the law treats him not as a guest but as a boarder; *Parkhurst v. Foster*, 1 Salk 388; and the goods of a permanent boarder are not protected as those of a guest; *Manning v. Wells*, 51 Am. Dec. 688; and that if a person who is a guest have a room in the inn specifically for the purpose of showing or selling his goods, he cannot hold the innkeeper to his liability as an innkeeper in respect to such goods. *Burgess v. Clements*, 4 Maule & S. 306.

In *Carter v. Hobbs*, 12 Mich. 52, plaintiff attended a dance given at defendant's hotel by the firemen of the town. During the evening he lost his overcoat and sued the innkeeper to recover the value thereof. The court held that the plaintiff was not under the circumstances a guest of the hotel and that the innkeeper was not liable for the loss of the overcoat. The court in its opinion said:

"But to hold the defendant liable as innkeeper, it must appear not only that the defendant kept an inn, and that the goods were lost there, but that he was acting in the capacity of innkeeper on the occasion when the goods were received, and that the plaintiff was his guest; or in other words, that the plaintiff visited the inn for purposes which the common law recognizes as the purposes for which inns are kept. * * *"

The case of *Fitch v. Casler*, 17 Hun 126 (N. Y. Sup. Court) presented facts similar in all substantial respects to the case under consideration. The plaintiff went to defendant's hotel on defendant's invitation to engage in a dance given by the defendant hotelkeeper. The plaintiff paid a charge for admission, which included his supper and care of his horse. It was held that plaintiff was not a guest of the hotel in such sense as to render the hotelkeeper liable for

goods lost at the hotel by the plaintiff. The court in its opinion on page 127 said:

“And, so in the present case, the plaintiff came on the invitation of the defendant. He came, not as to an inn or hotel, but as to a ballroom, for the purpose of engaging in a dance. He was to pay a certain charge for admission, and this charge included the care of his horse. Still he was not a traveler and did not come in that character. He would have had no right to come, if he has not been invited. * * *

The defendant, in this instance, was in the same position with any other owner of a ballroom, who should, for the purpose of profit, invite certain persons to come to it for a dance, and should charge them a certain price for the dance, the supper and for the care of the horses.”

Applying the doctrine of the above cases to the Hotel Sherman dances, we are of the opinion that persons attending these dances under the circumstances above set forth are not at the hotel for a purpose which the common law recognizes as one of the purposes for which hotels are kept and that the conditions do not establish the relation of innkeeper and guests between the hotel and persons attending the dances and that such persons are not guests of the hotel within the meaning of the term “guests” as used in the ordinance above quoted from.

The ordinance forbids generally the sale of intoxicating liquors in any place other than the place specifically described in the license. The exception in the case of hotels applies only when the liquors are served by the hotel *to its guests*, in which case the liquors may be served on any floor of or in any part of the hotel.

Holding, as we do, that persons attending the Hotel Sherman dances are not there in the capacity of guests of the hotel, it follows that the Hotel Sherman has no right to sell wine to such persons or to serve them with wine at any time in the banquet room on the third floor without having a dramshop license for said banquet room and that the sale of wine, or the serving of wine, in the banquet room to persons attending such dances, without a license as aforesaid, is a violation of said Section 1527 of the Chicago Code of 1911.

If the Hotel Sherman should take out a dramshop license

for the banquet room on the third floor it would have the right to serve liquor in the banquet room.

If, after having taken out such dramshop licenses, no bar-room or saloon should be maintained on the third floor, but the license should be used solely for the purpose of authorizing the serving of liquor in the banquet room, the question whether the banquet room would have to be closed at 1:00 o'clock a. m. would be one of considerable doubt under the present condition of the court decisions on this subject.

In a recent case involving the keeping open after 1:00 o'clock a. m. of a south side restaurant which was contiguous to a bar room conducted by the same proprietor, in which restaurant liquors were served from the barroom until, but not after, 1:00 o'clock a. m., a judge of the Municipal Court held that the restaurant was a part of the saloon and, it being shown that the restaurant was kept open after 1:00 o'clock a. m., a conviction for a violation of the 1:00 o'clock closing ordinance resulted. This case was taken by the defendant to the Appellate Court and is now pending in that court.

Subsequent to the conviction in the case above mentioned, other cases for keeping the same restaurant open after 1:00 o'clock a. m., under the same circumstances as existed at the time of the first prosecution, were tried before another judge of the Municipal Court who held that the restaurant was not a part of the saloon and discharged the defendant.

While we are of the opinion that a proper application of the law to the facts called for a conviction in all of these cases, nevertheless it is apparent that in view of the direct conflict in the views and decisions of the judges of the Municipal Court, the law on the subject must be considered as unsettled and in doubt until the question involved is passed upon by the Appellate Court.

There is another matter of considerable importance involved in the question of the Hotel Sherman's right to give the dances in question, and while not strictly responsive to the inquiries contained in your communication, we think it should be called to your attention.

It appears that the dances are conducted by the Hotel Sherman for gain and that an admission fee is charged. We

are of the opinion that such dances cannot lawfully be conducted without a license issued therefor. We are informed by the city collector's office that no amusement or "dance hall" license has been issued for the dances held in the banquet room. Such license cannot be issued except upon your approval.

Under date of October 21, 1913, we rendered you an opinion in the matter of the application of the American Music Hall for a dance hall license, in which the question of the Mayor's discretion in granting or refusing an application for a dance hall license was treated at length, and the conclusion was reached that if the Mayor's judgment leads him to the conclusion that the place for which the license is applied for is not a fit and proper place for a dance hall and he refuses the licenses he would probably be upheld by the courts, since his action would be based on a reasonable exercise of the discretion given him by law.

For your convenience a copy of said opinion is attached hereto.

Yours respectfully,
LEON HORNSTEIN,
BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

NOVEMBER 26, 1913.

HON. RAY PALMER, City Electrician.

Dear Sir:

We have your communication of the 14th instant, accompanied by letter of the 8th instant of E. W. Collins, general superintendent of the Postal Telegraph-Cable Company, relative to the tax paid by said company to the City of Chicago on telegraph poles used by the company in the streets and public places of the city and telegraph wires crossing the streets for the year 1912, pursuant to Section 2527, Chapter 76, of the Chicago Code of 1911 and the supplemental bill rendered by the city and requesting an opinion from this department regarding the matter.

Mr. Collins' statement of the amount due and paid to the city is as follows:

450 poles, \$1.00 each.....	\$450.00
898 single street crossings, 10c each.....	89.80
743 cable conductors, 2½c each.....	18.57
Total	<u>\$558.37</u>

The city checked up these returns and presented a supplemental bill for \$175.36, according to its statement of the amount due to the city, for the year 1912, as follows:

508 poles, \$1.00 each.....	\$508.00
25 foreign poles, \$1.00 each.....	25.00
849 street crossings, 10c each.....	84.90
4633 cable conductors, 2½c each.....	115.83
Total	<u>\$733.73</u>
Amount paid by telegraph company.....	\$558.37
Still due the city, according to supplemental bill	<u>\$175.36</u>

Mr. Collins protests that some of the charges in the city's supplemental bill are not authorized by the ordinance and that the statement is improper because it includes, first, twenty-five poles belonging to the City Railway Company and the Electric Light Company; which are carrying the company's telegraph wires; second, forty-six poles owned by the Automatic Telephone Company carrying wires leased by the telegraph company to the South Bend Telephone Company for telephone purposes between Chicago and South Bend; third, that the item of cable conductors in the city's supplemental bill includes those attached to the elevated railroad.

Mr. Collins urges that the foregoing twenty-five poles mentioned to which his company has wires attached, although used for telegraph purposes, are not *telegraph poles* and should not be included in the company's tax.

The clause of the ordinance imposing an annual tax on telegraph poles is as follows:

“* * * and in addition a fee of one dollar per annum for each and every telegraph pole used by it in the

streets, alleys, public grounds or public places of the city
* * *

On July 10, 1913, this department, in an opinion to you, held that in its interpretation of the ordinance the words "telegraph pole" in the foregoing clause include "trolley, power, and any and every kind of pole to which telegraph wires are attached and maintained by the telegraph companies mentioned." (The Postal Telegraph-Cable Company and the Western Union Telegraph Company.) We, therefore, differ from Mr. Collins in our interpretation of this clause of the ordinance and in our view of the matter these poles are properly included in the city's statement.

We do not think, however, that the foregoing language of the ordinance, nor of the opinion interpreting the same, contemplates a tax upon the poles mentioned in exception number two,—those belonging to the Automatic Telephone Company and carrying wires leased by the telegraph company to the South Bend Telephone Company for telephone purposes.

With reference to the third exception to the city's supplemental bill, Mr. Collins' letter states:

"The city has also included the sixty wires we have in an aerial cable on the elevated railroad, but the ordinance says nothing about this * * *"

We are informed by Mr. Leser, superintendent of construction of the electrical department, that the sixty wires in question are carried in an aerial cable, attached to the structure of the Metropolitan Elevated Railroad on its right of way and crossing streets from Clinton street to Forty-eighth avenue.

The clause of the ordinance imposing an annual fee upon telegraph wires crossing streets is as follows:

"* * * and in addition an annual fee of two and one-half cents per wire for each street crossed by wires owned or used by said telegraph companies and carried upon poles not located upon any street, alley, public ground or public place of the city, but maintained by such telegraph companies upon railroad rights of way or private property within the City of Chicago; and in addition an annual fee of ten cents per wire for each street crossed by wires strung over or upon houses or other buildings, except, however, that when such wires so strung

on or over houses or buildings are in cables containing five or more wires, the annual fee shall be two and one-half cents per wire for each street crossed; * * *"

The language of the first clause, *supra*, appears to us to restrict the fee upon wires crossing streets from right of way of railroad or private property to those carried upon poles maintained by the telegraph company upon such right of way or private property; while the second clause is designed to cover wires crossing streets where the same are attached to houses or other buildings.

We see no reason why the wires crossing streets, attached to the elevated structure on its right of way, should not be subject to a tax or fee, the same as though attached to a house or other building. But the specific statement regarding tax to be imposed on wires upon railroad rights of way in the first clause, *supra*, in our opinion, precludes including the wires in question among those contemplated to be taxed by the second clause, *supra*, covering wires crossing streets strung over houses or other buildings. Save for the specific indication of the first clause the elevated structure, might, perhaps be included in the second clause in the phrase "other buildings."

We therefore concur in Mr. Collins' views of the matter to the extent and are of the opinion that the exceptions to the city's supplemental bill referred to herein as numbers two and three are not within the ordinance and that these two charges should, therefore, be eliminated from the city's statement.

We herewith enclose Mr. Collins' letter.

Yours very truly,

GEORGE B. O'REILLY,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 1, 1913.

HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

A communication from your office signed by H. F. Schuetler, acting general superintendent of police, dated October 30, 1913, has been referred to me for reply. It states that punch boards have been adjudged gambling devices; the parties having them in their possession were arrested and fined. The premiums or prizes were also seized by your officers. But the court in entering its judgment made no decision as to the disposition of the prizes. The question now arises as to whether or not your department can legally confiscate the prizes.

Under the above state of facts unless there was a judicial determination as to the disposal of the property by the court the above described premiums cannot legally be confiscated.

Bobel v. People, 173 Ill. 19, 26.

Glennon v. Britton, 155 Ill. 234, 241.

State v. Robins (Ind.), 8 L. R. A. 438, and authorities.

Frost v. People, 193 Ill. 635, 640. |

And even in the case of stolen property or money there must be a judicial determination before it can be taken away from the guilty party.

Stuart v. Harris, 69 Ill. App. 668, 674, 675.

In reply to the question as to whether or not property not in itself a gambling or fraudulent device or an illegal article, used in connection with gambling devices or lotteries, as to whether they can be confiscated or forfeited, we wish to state that the law of our state and city is as follows:

“137g. DECLARED A GAMBLING DEVICE—CONFISCATION.) §2. Every clock, tape, machine, slot machine or other machine or device for the reception of money on chance or upon the action of which money is staked, hazarded, bet, won or lost, is hereby declared a gambling device and shall be subject to seizure, confiscation and destruction by any municipal or other local authority within whose jurisdiction the same may be found.” (Hurd’s R. S., Chapt. 38, Crim. Code, Sec. 2, Laws of 1895.)

And division 8, *Ibid.*, controls seizure under search warrants.

Subdivision 4 of paragraph 373 is as follows:

"4. To search for and seize gaming apparatus, or implements used, or kept and provided to be used in unlawful gaming in any gaming house, or in any building, apartment or place resorted to for the purpose of unlawful gaming."

Section 7 of division 8, *Ibid.*, is as follows:

"378. DISPOSAL OF PROPERTY.) §7. When an officer, in the execution of a search warrant, finds stolen or embezzled property, or seizes any of the other things for which a search is allowed by this act, all the property and things so seized shall be safely kept by direction of the judge, justice or court, so long as necessary for the purpose of being produced or used as evidence on any trial. As soon as may be afterwards, all such stolen and embezzled property shall be restored to the owner thereof, and all the other things seized by virtue of such warrants shall be burnt, or otherwise destroyed, under the direction of the judge, justice or court. (R. S. 1845, p. 192, §211.)"

The City of¹ Chicago derives its authority under the police power and clause 45 of Section 1, Article V, Chapter 24, of the Cities and Villages Act, which in part is as follows:

"* * * to suppress gaming and gambling houses, lotteries and all fraudulent devices and practices for the purpose of gaming or obtaining money or property. * *

In pursuance of this authority the city has enacted into a law Section 983 of the Chicago Code of 1911, which is as follows:

"983. SEIZURE OF GAMING IMPLEMENTS.) It is hereby made the duty of every member of the department of police to seize any table, wheel, instruments, device or thing used for the purpose of gaming or gambling for money or other valuable thing; and all such tables, instruments, devices or things when seized shall be destroyed.

Any person obstructing or resisting any member of the police department in the performance of any act authorized in this section shall be fined not less than twenty-five dollars nor more than fifty dollars for each offense."

It will be noticed that not any of the above enactments cover anything but gambling devices *per se* and articles which are actually used for gambling purposes. We have three leading cases in this state interpreting these laws. They are *Glennon v. Britton*, 155 Ill. 234, *Bobel v. People*, 173 Ill. 19, and *Frost v. People*, 193 Ill. 635, which broadly cover search, seizure and destruction of gambling devices. Still none of the above cases covers the exact matter under discussion except by implication, namely, property otherwise lawful except that it is utilized in connection with gaming. In all of the above three cases the articles in question are gambling devices *per se*. The Britton case, *supra*, the subject matter of which was a seizure of gambling devices under a search warrant, is very broad in its rulings as will be seen by the following quotations:

(p. 242.) "Certain articles or things customarily regarded as property when lawfully acquired and used for a lawful purpose, may, by proper statutory enactment, cease to be so treated, and become liable to seizure, forfeiture and destruction, if they or their use is deemed pernicious or dangerous to the public welfare * * *"

(p. 244.) "The object of the proceedings to be instituted under the statute is, that the unlawful and immoral practice be stopped, by destroying implements, apparatus, materials, etc., with which it is carried on. The theory is, in respect of such property, that no one is longer the owner of it. The moment it is used and applied in the unlawful business it becomes liable to forfeiture, and though the claimant may appear and claim it, he has no greater rights in property so used than has any other person. * * *"

(p. 245.) "Under the various acts of Congress goods and things are seized, condemned and destroyed without service of process on the owner, other than seizure of the goods and arrest of the person in whose possession they are found, and that such statutes, and proceedings under them, are regarded constitutional and valid has been determined in many adjudicated cases in the federal courts."

In the Frost case, *supra*, lawful property which was not actually in use for gambling purposes (desks and chairs) were seized as well as crap tables, etc. The trial court released the desks and chairs and ordered the destruction of the gambling devices and upon this state of the record the cause is appealed,

and therefore the confiscation and forfeiture of the lawful property was not really an issue and the Supreme Court found no fault with the decision of the trial court.

It will be noticed that in neither the state nor the city enactments is the word "forfeiture" used (which means the property is given to the injured party) nor is the word "confiscate" used except in the paragraph 137g *supra*, and there it is used with "seizure, confiscate and destruction," and all of said enactments are made not for any purpose of forfeiture and confiscation, but for the destruction of the immoral thing itself.

The legal definition of confiscation is to appropriate to the use of the state. Section 983 of the ordinance only mentions gambling devices, namely tables, wheels, instruments, device or other thing and under the circumstances the phrase "or other thing" does not include premiums or prizes or lawful property which is not actually used for the purpose of gaming, as under the doctrine of *ejusdem generis* "or other thing" means gambling devices of the class before enumerated.

Shirk v. People, 121 Ill. 61.

While the court in the Glennon case, *supra*, speaks broadly of forfeiture and cites numerous authorities used, still upon a persual of these authorities we find the forfeiture occurred under statutory enactments, principally for violation of the United States revenue laws. Lawful property used in connection with gaming may be forfeited by statute as will be seen by reference to the case of *Com. v. Gambling Implements*, 155 Mass., cited in notes 12 L. R. A. n. s. p. 395, as follows:

"Where gaming property had been seized, and it was held that the condemnation and forfeiture were wrong, for the reason that it was not found that the property was unlawfully used, or intended to be unlawfully used, the court said: 'The difficulty of enforcing the statutes against gaming is so great that the legislature has found it necessary to make stringent laws; and so it is provided that not only the implements of gaming may be seized, but the personal property, furniture and fixtures found in the gaming house, and that said prop-

erty, if unlawfully used, or intended to be unlawfully used, in the business carried on there, may be forfeited. * * * ”

We are of the opinion that our Illinois Statutes and Ordinances are not sufficiently broad enough to confiscate property not unlawful in itself if not actually used as gambling implements. *Glennon v. Britton, supra*, as above quoted on pp. 242-243, also *State v. Robbins, supra*, 8 L. R. A. 439, wherein the following statement of the law appears:

“It is fundamental that no person can be deprived of any article which is recognized by the law as property without a judicial hearing, after due notice. No degree of misconduct or wrong can justify the forfeiture of the property of a citizen, except in pursuance of some judicial procedure, of which the owner shall have notice, and in which he shall have the opportunity to contest the ground upon which the forfeiture is claimed. *Lowry v. Rainwater*, 70 Mo. 162; 35 Am. Rep. 420; *People v. Copley*, (Ill. C. C.) 4 Crim. Law Mag. 187; 8 Am. & Eng. Ency. Law, 1081.”

Mullen v. Mosely, 12 L. R. A. n. s. 394, 398, and also the following apt language is therein used on page 399:

“A man might commit murder with an implement of husbandry or the tool of an artisan, but for that reason the legislature would not be justified in directing the summary seizure and destruction of hoes and hammers, but it might with wisdom and propriety authorize the summary destruction of infernal machines.”

Board of Police Commissioners of Baltimore v. Wagner, 52 L. R. A. 775, wherein the following appears on pp. 777 and 778:

“* * * the property seized under the concessions of the demurrer is an instrument intended and designed to be used in violation of the gambling laws, and one of such a character that ‘it can be put to no legitimate use.’ It does not, therefore, belong to the class of articles that may or may not be used for legal purposes. * * * Thus a burglar’s or gambler’s tools or counterfeit money may be seized and confiscated under appropriate acts. *Schouler Pers. Prop. §24.* * * *

We have been cited to no case where these principles have been denied. Those relied upon by the appellee, some of which have already been adverted to, are not in

conflict with them. Those are cases where the articles seized may be put to legal as well as illegal uses, and, until it has been shown before the proper tribunal that it was designed to be put or has been put to an illegal use it cannot be seized as a preventive measure."

Also the following may be quoted from our Illinois bill of rights, Article II, Sec. 11, p. 54, Hurd's R. S. 1909:

"And no conviction shall work corruption of blood or forfeiture of estate."

CONCLUSION.

Therefore, we are of the opinion that property not immoral in itself, and not used as a gambling implement, but simply as a prize to be won as a result of gaming, cannot be seized and confiscated unless under sufficiently broad statutes or ordinances, and that our laws are not at this time sufficiently broad so to do, with the possible exception that inasmuch as gaming is a nuisance under the common law, it may be suppressed by executive officers summarily if it amounts to a nuisance, and if these measures are necessary in order to suppress the same. As will be seen by the ruling in the case of *Glennon v. Britton, supra*, and *Mullen v. Mosely, supra*.

However, such property (lawful property) may be seized and held whenever it becomes necessary as evidence at the hearing. The following apt language appears in *Getchell v. Page*, 18 L. R. A. n. s. 253, on page 256:

"The title to the property remains in the owner, but the lawful possession is temporarily in the officer for evidentiary purposes, subject to the order of the court." (And the numerous authorities cited in the editor's notes therein.)

Respectfully,

M. W. CAGNEY,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

P. S. However, if these prizes are lost or unclaimed your department can then turn them over to the Treasurer of the Police Pension Fund.

DECEMBER 6, 1913.

HON. H. D. CAPITAIN, Chairman, Charter Convention Committee.

Dear Sir:

We have your inquiry of November 18th, upon the question as to whether the City Council may legally expend the money necessary to conduct an election of delegates to a charter convention and how such an election may be held.

Section 2 of Article VI of the Cities and Villages Act, Hurd's Revised Statutes 1909, is as follows:

“73. OTHER OFFICERS—DUTIES OF CITY MARSHAL.)

§2. The city council may, in its discretion, from time to time, by ordinance passed by a vote of two-thirds of all the aldermen elected, provide for the election by the legal voters of the city, or the appointment by the mayor, with the approval of the city council, of a city collector, a city marshal, a city superintendent of streets, a corporation counsel, a city comptroller, or any or either of them, and such other officers as may by said council be deemed necessary or expedient. The city council may, by a like vote, by ordinance or resolution, to take effect at the end of the then fiscal year, discontinue any office so created, and devolve the duties thereof on any other city officer; and no officer filling any such office so discontinued, shall have any claim against the city on account of his salary, after such discontinuance. The city marshal shall perform such duties as shall be prescribed by the city council for the preservation of the public peace, and the observance and enforcement of the ordinances and laws; he shall possess the power and authority of a constable at common law, and under the statutes of this state.”

The City Council may under the foregoing power by ordinance passed by vote of two-thirds of all the aldermen elected, provide for a charter convention to be composed of delegates to be elected by the people of the city from each ward. The election may be held in the same manner and at the same time as the election of other city officers.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 6, 1913.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen :

On November 10, 1913, your Honorable Body passed an order directing the Corporation Counsel to prepare and submit to you an ordinance to prohibit false and fraudulent advertising by physicians and others. (See p. 2563 of the Council Proceedings of that date.) We herewith transmit draft of such ordinance.

The scope of the ordinance as drafted is general to avoid the objection of class legislation but covers the case of false and fraudulent advertising by physicians.

On the other hand, the media of false and fraudulent advertising against which the ordinance is directed are limited in the draft so as to bring the ordinance within the legal limitations of the City Council to legislate upon this subject matter.

The city has not the power to pass all ordinances to prevent fraud and imposition. In the enumeration of the powers of the City Council there are, however, included the power to

“regulate and prevent the use of streets, sidewalks and public grounds for signs, * * * posting handbills, and advertisements” (clause 17) ;

“to regulate and prohibit the exhibition or carrying of banners, placards, advertisements or handbills in the streets or public grounds or upon the sidewalks” (clause 18) ;

“to regulate and prevent the flying of flags, banners or signs across the streets or from houses” (clause 19) ;

“to regulate sales upon the streets, sidewalks and public places” (clause 20) ;

“to pass and enforce all necessary police ordinances” (clause 66) ;

That the proposed ordinance is one which would properly come within the classification of a police ordinance cannot be questioned, but the Supreme Court of this State has held that, under clause 66, the City may pass only such police

ordinances as relate to the subject matter over which the City Council has been given express control.

City v. M. & M. Hotel Co., 248 Ill. 264.

We have, therefore, limited the scope of the ordinance so as to punish the making of a false statement in an advertisement circulated or posted upon the streets and public places of Chicago over which the City has control by express authority from the legislature.

We believe that such an ordinance may be sustained under the authority of the *City of Chicago v. Kluever*, 257 Ill. 317.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

DECEMBER 10, 1913.

HON. JOHN A. RICHERT, Chairman, Finance Committee.

Dear Sir:

Your communication of the 1st inst., transmitting letter to your committee of Hon. L. E. McGann and claim of the Chicago Telephone Company for the cost of repairing a conduit on Fulton street which was damaged by the caving in of a ditch which was being excavated by the Water Pipe Extension Division, has been referred to me for reply.

The streets of the city are primarily to be used for public purposes, and the use of streets by public utility companies is secondary and subordinate to the use of the streets by the city for public purposes.

The granting of privileges in the streets of a city will not impose or result in creating greater obligations on the part of the city than exist in the absence of such grants and damage to conduits, pipes, wires and mains constructed under the streets, resulting from the construction by the city of public works thereunder, is *damnum absque injuria*, for which the city is not liable.

New Orleans Gas Co. v. Drainage Commission, 197 U. S. 453.

Water Commissioners v. Hudson, 13 N. J. Equity, 420.
Anderson v. Fuller, 51 Florida, 380, 6, L. R. A., n. s.,
 1026.

City of San Antonio v. San Antonio Street Ry. Co., 15
 Texas Civ. App. 8.

Kirby v. Citizens Railway Co., 48 Maryland, 168.

K. C., St. J. & C. B. Ry. Co. v. Morley, 45 Mo. App.,
 304.

We therefore advise your committee that the city is not
 legally liable for the above claim.

Respectfully submitted,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 11, 1913.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In your communication of the 9th instant, you request
 an opinion upon the following questions:

1. How many subjects may be submitted at one
 time under the Public Policy act in a general referendum?
2. Whether the three propositions suggested for
 subway construction would be regarded as three separate
 questions or as merely one question?

Section 1 of the Public Policy act (Hurd's Rev. Stat. of
 Ill. 1911, p. 1065), after providing that on a written petition
 signed by twenty-five per cent. of the registered voters
 of any city it shall be the duty of the proper election officers
 to submit any question of public policy so petitioned for to
 the electors of the city at any general or special election
 named in the petition, provided such petition is filed with the
 proper election officers not less than sixty days before the date
 of the election at which the question or questions petitioned for
 are to be submitted, concludes as follows:

"Not more than three propositions shall be sub-
 mitted at the same election and such proposition shall be
 submitted in the order of its filing."

In regard to the second question presented in your communication, a somewhat analagous situation arose in 1907 which was passed upon by the Election Commissioners and by Judge Tuthill of the Circuit Court. At that time a petition was filed with the Commissioners in which three questions were asked to be submitted to the voters, one in respect to the approval of the 1907 traction ordinances, another in respect to whether the city should proceed to acquire and equip a unified street railway system, instead of passing the traction ordinances, and a third in respect to whether the legislature should repeal the Sunday closing laws.

It will be observed that the first and second questions, contained in the petition, were on the same subject-matter and that the second question was an alternative to the first.

After a full hearing the Election Commissioners on February 21, 1907 entered an order denying the petition on the ground that only one question could lawfully be petitioned for in one petition. It is manifest that the Commissioners considered each of the questions on the petition as a separate question notwithstanding two of them were on the same subject-matter and one alternative to the other.

Shortly thereafter a petition for mandamus was filed in the Circuit Court of Cook County against the Election Commissioners (*People ex rel. Fitzpatrick et al. v. Cannon et al., Election Commissioners*) to compel them to place upon the ballot the three questions contained in the petition filed with them. On March 23, 1907 Judge Tuthill denied the petition for mandamus and in so doing handed down an opinion which is convincing in its reasoning.

In the case of the three proposed subway questions the voter has the privilege of voting on any of the questions or all of them as he sees fit.

We are of the opinion that each proposition in respect to the subway is a separate question and that the three proposed propositions cannot be considered as one question; and we are also of the opinion that if the questions in respect to the subway be considered as questions of public policy, a separate petition will have to be filed for each of such questions or propositions sought to be submitted to the electors.

The Public Policy act was approved May 11, 1901 and in force July 1, 1901. As hereinabove stated, said act provides for the submission of any "*question of public policy.*" It is this act which provides for the petition of twenty-five per cent. of the registered voters and the filing of such petition not less than sixty days before the date of the election and that not more than three propositions shall be submitted at the same election.

The Ballot law act went into force on July 1, 1891, ten years prior to the Public Policy act. The Ballot Law (Section 16) makes provision for voting on a separate ballot upon a "*constitutional amendment or other public measure*" and sets out the form of ballot to be used.

The Ballot Law makes no provision for the filing of a petition of voters in order to have the constitutional amendment or "public measure" put upon the ballot nor does it limit or refer to the number of "public measures" that may be submitted at the same election.

From a statement made in the opinion of the court in the case of *People v. Cannon et al., Election Commissioners*, 236 Ill. 179, the commissioners apparently held in the matter therein referred to that in order to be a question of public policy, the question "must be for the purpose of obtaining an expression of the public sentiment upon the enactment of a new law by the proper authorities or the repeal or amendment of a law already upon the statute books."

We, however, consider that there is very considerable doubt whether "the questions of public policy," referred to in the Public Policy act, are the same as the "public measures" referred to in the Ballot Law.

The proposed subway ordinances are (or when passed will be) public laws passed by the City Council to come into force and effect upon approval of them by the voters. The vote on the question of the approval of these ordinances might well be considered a vote on *public measures* as distinguished from *question of public policy*, and if the vote is one on a public measure, then it is at least doubtful whether the petitions of voters would be necessary in order to have the subway questions put upon the ballot, and whether the prop-

ositions relating to subways would be subject to the limitation in respect to the number of public policy questions that may be submitted at the same election.

In conclusion we think it the safer course to have separate petitions of voters for each of the subway propositions sought to be submitted.

Yours respectfully,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 11, 1913.

MR. BENJAMIN B. MORRIS, 1314 Ashland Block, City.

Dear Sir:

Your communication of December 1, 1913, to this department has been referred to me for reply. In your communication you object to the regularity of the issuance to F. M. Miller of a permit to build an ice plant on the west side of Turner avenue near Gladys avenue.

The permit was issued under an ordinance passed January 8, 1913, in the Journal of the Proceedings of the City Council, page 3247, which in part is as follows:

“* * * that it shall be unlawful for any person, firm or corporation, to locate, establish, conduct or maintain any ice making house or cooling plant in any block in which two-thirds of the buildings fronting on both sides of the street on which the proposed plant shall be located are devoted exclusively to residence purposes, unless the owners of the majority of the frontage in said block, on both sides of the street, in which said plant is located shall consent in writing to the location, establishment, conducting or maintenance of such plant in such block.”

In your communication you admit that the petition is apparently signed by a majority of the owners of the total number of feet on both sides, but you contend that the petition for frontage consents does not show a majority of the frontage in said block on each side of the street and therefore

you request that the permit for building the ice plant be recalled by the city officials.

We wish to state that upon a careful persual of the ordinance in question we are of the opinion that the language of the ordinance when interpreted in its usual and accepted terms does not require that the frontage petition shall show a majority of frontage consents on each side of the block in question and it is a compliance with the ordinance that the petition shows a majority of the frontage when considered together with the frontage of the entire block, as we believe that it was the intention of the city council when it passed the ordinance in question that a majority of both sides of the street in the block was all that was required. Had the council intended that a majority of the frontage on each side of the street would be required it would have so stated as it did in the ordinance requiring frontage consents when hospitals should be erected. See Section 1219 of the Chicago Code of 1911, which in part is as follows:

“* * * unless the owners of a majority of the frontage in such block and the owners of a majority of the frontage on the opposite side or sides of the street or streets on which said building faces, consent in writing,
* * *”

The Appellate Court in the case of *Wise v. City of Chicago*, number 20,014, decided November 20, 1913 upon an ordinance with phraseology quite similar to the one in question. The court there had under consideration the garage frontage ordinance (Section 2684 of the Chicago Code of 1911), wherein the following appears:

“* * * in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, or within one hundred feet of any such street in any such block, without the written consent of a majority of the property owners according to frontage on both sides of the street.”

In passing upon the point as to what constituted two-thirds of the buildings (residence or business) the question there arose and the court decided that buildings on both sides of the street should be considered together.

Our state courts have repeatedly held that the intention of

the legislative bodies should be carried into effect wherever possible and that the intention of an ordinance or law is the main feature, notwithstanding any inappropriate phraseology, which we do not concede in the ordinance of January 8, 1913.

In the case of *City of Springfield v. Green*, 120 Ill. 269, the court at page 274 says:

“Doubtless, the highest degree of accuracy in the use of language would require the word to be used in the restricted sense contended for; but that degree of accuracy, it is well known, is not generally attained, and is hardly to be expected, in the framing of statutes or city ordinances. If such strictness in the use of language were applied by the courts in construing ordinances, doubtless the purpose with which many of them are passed, would be defeated. Whenever the meaning of a word, as used in a statute or ordinance, becomes the subject of controversy in a legal proceeding, the ascertainment of its strict primary signification is not a matter of so much importance as it is to discover the sense in which it was used by the legislative body, for the latter must control, although the word has been used without proper regard to its appropriate and primary meaning.”

Therefore we are of the opinion that the permit in question was properly issued by the building officials if the petition for frontage consents had a majority of the frontage on both sides of the street in the block in question when considered together.

Yours respectfully,

W. M. CAGNEY,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

DECEMBER 18, 1913.

HON. JAMES S. MCINERNEY, Prosecuting Attorney, City of Chicago.

Dear Sir:

On December 1, 1913, you asked for an opinion as to whether Peter Merkle & Sons, of 143 W. Van Buren street, at which premises they conduct a restaurant, must in addition

to the restaurant license secured by them obtain a bakery license, by reason of the fact that their baking is done in a separate room and in an oven 7 feet by 8 feet, although all the baking done by them is for their own consumption in the restaurant.

Section 140 of the Chicago Code of 1911 defines a bakery as follows:

“140 BAKERY DEFINED.) Any place used for any process of mixing, compounding or baking, for sale or for purposes of a restaurant, bakery or hotel, any bread, biscuits, pretzels, crackers, buns, rolls, macaroni, cake, pies or any food product of which flour or meal is a principal ingredient, shall be deemed a bakery for the purpose of this chapter; provided, that licensed restaurants in which any of the foregoing food products are mixed and baked for consumption in such restaurant only, on or in ordinary restaurant kitchen stoves or ranges, and kitchens or rooms in dwellings where any of the said food products are mixed and baked in an ordinary kitchen stove or range, shall not be considered bakeries.”

The bakery ordinance was upheld in *City of Chicago v. Drogasawacz*, 256 Ill. 34, as a regulatory ordinance and not as a revenue measure.

The license fee required under the bakery ordinance is intended to cover the cost of inspection. It may well be that by reason of the character and the amount of baking done by Peter Merkle & Sons for their own consumption, separate inspections are necessary for the rooms used in connection with the restaurant and for the room used for baking purposes.

If the bakery ordinance does not apply to this case, the Health Commissioner could not enforce the provisions for ventilation; light; cleanliness of the premises, employes and machinery; plumbing and screens; that no person afflicted with certain diseases should be employed; that basement bakeries must have cement or other impervious materials for floors; that storage rooms must be kept dry; that no person should sleep in a bakery or in rooms where the flour or meal are stored; and that the use of tobacco and spitting on the floors in the bakery should not be permitted.

All of the foregoing provisions would be ineffective as

to bakeries used only in connection with licensed restaurants. There can be no valid reason why such a distinction should be made where baking is done on a large scale.

By the express terms of the ordinance, all licensed restaurants in which such baking is done for consumption in such restaurant only are not exempted in the definition of a bakery, but only those restaurants where the baking is done "on or in ordinary restaurant kitchen stoves or ranges" are excluded in the definition of a bakery. If these words are given effect, as they should be, Peter Merkle & Sons are required to procure a bakery license.

Yours very truly,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

DECEMBER 18, 1913.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

Your communication to this office, dated December 3, 1913, has been referred to me for reply.

It concerns the question of frontage consents as to whether they are necessary before the issuance of a permit by your department for an illuminated roof sign at the northwest corner of Grand boulevard and Fifty-first. It is stated that inasmuch as Fifty-first street is a business street in this particular block it is contended that frontage consents are unnecessary.

By further communication with your department we find that the height of this illuminated roof sign is twelve feet (12') and the length one hundred and seventy-five feet (175').

The issuance of like permits is regulated by Article 23 of the Chicago Code of 1911 and is headed, "Billboards, Signboards, Signs and Fences." Section 707 is in part as follows:

"707. FRONTAGE CONSENTS REQUIRED.) It shall be

unlawful for any person, firm or corporation to erect or construct any billboard or signboard in any block on any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining the consent in writing of the owners or duly authorized agents of said owners owning a majority of the frontage of the property on both sides of the street in the block in which such billboard or signboard is to be erected, constructed or located."

The question might arise under other circumstances as to whether or not an illuminated roof sign is a synonymous description of that of a billboard or signboard and as to whether or not frontage consents would be then necessary, but inasmuch as this proposed illuminated roof sign is twelve feet (12') in height and paragraph (b) of Section 710 controls the erection, etc., of roof signs is in part as follows:

"Any illuminated roof sign, less than twelve feet in height, shall be exempt from the provisions of this section and shall be held to be governed by the ordinances of the City of Chicago relating to bill-boards and signboards."

And again at the end of said paragraph the following appears:

"* * * provided, however, that the provisions of this section shall not apply to the erection, construction and maintenance of signboards and billboards as regulated by the ordinances of the City of Chicago."

Inasmuch as there is nothing further in said article or any amendments thereto concerning frontage consents for illuminated roof signs and a sign of the size of the proposed sign is specifically exempt from the remainder of the sections in said article, we are of the opinion that frontage consents for illuminated roof signs of the size of the proposed sign are unnecessary.

We would, however, call your attention to paragraph (e) of Section 710 of the Chicago Code of 1911 which is in part as follows:

"The permission and authority granted by this ordinance shall cease at any time hereafter at the discretion of the mayor."

It, therefore, follows that if the mayor in his discretion

has the right to revoke the permit for illuminated and other roof signs as set out in Section 710, he has perforce the authority and right to refuse a permit for any sign authorized in said section.

Yours very truly,

M. W. CAGNEY,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

DECEMBER 12, 1913.

JOHN D. RILEY, Esq., Superintendent of Maps.

Dear Sir:

Your communication of the 24th ult., in which you request an opinion as to the effectiveness of certain purported vacation instruments described as documents 2039809, 1730144 and 1885010, whereby it is sought to vacate parts of "Hillard and Dobbins" subdivision of part of Section 6, Township 37 North, Range 14, etc., and parts of streets shown on the plat of said subdivision, may be answered as follows:

1. Hillard and Dobbins Subdivision includes all that part of said section west of the right of way of the Pittsburgh, Cincinnati and St. Louis Railroad Company, except the west half of the northwest quarter and the west half of the southwest quarter thereof.

The survey appears to have been made by a "Licensed Surveyor" whose certificate is dated May, 1874. The plat was acknowledged by the owners of the land May 28, 1874 and recorded August 1, 1874.

It is therefore a common law plat.

Under the decisions of the Supreme Court any part or all of such a plat can be legally vacated only when all the owners join in the declaration.

II. From the documents submitted I find that five separate instruments of vacation, the first in 1888 and the last in 1894, were placed upon record.

The first two purport to vacate certain blocks and the adjoining streets in Hillard and Dobbins Subdivision by the

owners of these blocks, separately, without the consent of the remaining owners of the land in said subdivision, while the remaining three instruments purport to vacate certain blocks in "Beverly Subdivision" and "A. Booth's Subdivision," both of which were carved out of parts of the original subdivision.

On the day on which the first two vacation instruments purport to have been acknowledged the same persons acknowledged plats of re-subdivisions of those parts which they had attempted to vacate.

I hold all of said instruments of vacation null and void. Each one purports to be made in accordance with Chapter 109 Revised Statutes. This cannot be done effectively in order to vacate a common law plat. In addition to this, the attempted vacation was made by the owners of only part of the property embraced in the original subdivision and is for this reason absolutely void.

III. The re-subdivisions carved out of certain blocks of the original subdivision cannot be held valid for the reason that no part of the original subdivision has ever been legally vacated. Until such a declaration is made in proper form the offer to dedicate streets and alleys remain open for acceptance.

The only exceptions to this rule would be open acts on the part of the public authorities which indicate an abandonment of the dedication, relying upon which private persons have constructed permanent improvements upon the alleged strips offered to the public.

The granting of building permits upon lots shown in the re-subdivisions would have the same effect.

IV. I find that in addition to the two re-subdivisions already mentioned there are also two others made out of parts of the original subdivision, one called "Longwood Subdivision" and the other "Beverly Hills Subdivision."

As to the latter, which purports to be made out of blocks 22, 23, 24, 25, 31 and 32 of "Hillard and Dobbins Subdivision" and Blocks 1, 2, 3, 4 and 5 of "A. Booth's Subdivision" of Blocks 10, 11 and 12 of the same original subdivision, I find that it was acknowledged and recorded in 1890.

It shows the following certificate:

"Approved, H. J. Jones, Examiner of Subdivisions."

I am of opinion that this approval of the plat by the officer designated for that purpose by the ordinances of the city, goes far in estopping the city from now entering any effective protest against the act of dedication.

You state that public improvements are in Pleasant avenue and in Prospect avenue, two of the streets appearing upon the original plat. If such is the case the right of the city to all of the streets shown on the original plat which have remained unincumbered by private possession as hereinbefore enumerated, is materially strengthened.

From memoranda attached I find that the names of certain streets in the original subdivision have been changed by ordinance. However, I also find that the names of streets laid out by plats of re-subdivision have been changed in the same manner, and for this reason that phase may be disregarded.

I trust the foregoing is ample to make plain the views of this department upon the complicated situation shown by the documents submitted and herewith returned.

Should you desire more definite information in the premises, I shall be glad to furnish same provided you will first submit a detailed report showing actual conditions in the territory involved.

Very truly yours,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

DECEMBER 15, 1913.

HON. L. D. SITTS, Chairman, Committee on Gas, Oil and Electric Light.

Dear Sir:

On December 4, 1913, your committee passed the following motion:

"That the Corporation Counsel be requested to sub-

mit to the Committee, an opinion as to whether the consolidation of these companies (Chicago Tunnel Company and the American Telephone and Telegraph Company), would be in violation of the Sherman Anti-Trust Law."

On the same day, you communicated to this department, the action taken by your committee with the request that we furnish you with an opinion upon this subject-matter.

Your committee has furnished us no information upon the facts necessarily involved in the determination of this question. Whatever we shall say hereafter is based solely upon matters of common knowledge and information given to us by the officers of the Chicago Tunnel Company. As our opinion has been requested for the meeting of your committee to-day, we have had neither time nor the facilities for verifying any of these statements of facts, although they are very material to the question before us.

The circumstances attending the matter referred to by your committee are as follows:

On and prior to February 20, 1899, the Chicago Telephone Company, a corporation organized and existing under the laws of the State of Illinois, owned and operated a comprehensive telephone system in the City of Chicago, and had a monopoly of all the telephone business in this city.

On February 20, 1899, the City Council of the City of Chicago passed an ordinance granting authority to the Illinois Telephone and Telegraph Company, an Illinois corporation, its assignees and lessees, to construct, maintain, repair and operate in the streets, avenues, alleys and tunnels, and other public places in the City of Chicago, and under the Chicago River and its several branches, for and during the term of thirty (30) years from the passage of said ordinance, a line or lines of conduits and wires, or other electrical conductors, together with all necessary feeders and service wires, or other electrical conductors, to be used for the transmission of sound, signals and intelligence, by means of electricity or otherwise.

The ordinance referred to contains the following provision:

"It shall be expressly the condition of this grant that if the Illinois Telephone and Telegraph Company, or any of its successors or assigns, shall either sell out to or

enter into any agreement with any existing telephone company, or any of its successors or assigns, doing business in the City of Chicago, which agreement would tend to make competition inoperative, this ordinance shall become null and void, and the plant of said company, together with the conduits, wires and poles then in the streets belonging to said company shall be forfeited to the city." (Sec. 2 of ordinance—see p. 1693 Council Proceedings 1898-1899.)

Under and by virtue of the authority of the aforesaid ordinance, an automatic telephone system was constructed in the City of Chicago, in competition with the telephone system owned and controlled by the Chicago Telephone Company. Under the automatic system, a subscriber may call and get in communication with another subscriber of the same system, by means of an automatic device attached to the subscriber's telephone, without the intervention of a telephone operator in a central exchange. By successive assignments and foreclosure proceedings, the Chicago Tunnel Company, an Illinois corporation, acquired and now owns this automatic telephone system.

At the present time, the Chicago Telephone Company claims to have some three hundred thousand (300,000) subscribers in the City of Chicago, while the Automatic System is reported to be serving between twenty thousand (20,000) and thirty thousand (30,000) subscribers in the City of Chicago. Many of the subscribers of the Automatic System are also subscribers of the Chicago Telephone Company.

Besides transacting a local telephone business, the Chicago Telephone Company has connections with the lines of the American Telephone and Telegraph Company, a corporation doing an intra-state and interstate telephone business whereby messages are carried from points in the City of Chicago over the lines of the Chicago Telephone Company and the lines of the American Telephone and Telegraph Company to points outside of the City of Chicago within the State of Illinois, and to points outside of the State of Illinois, including the City of South Bend in the State of Indiana, St. Louis, Missouri and St. Paul and Minneapolis in the State of Minnesota.

It is generally believed that the American Telephone and Telegraph Company owns and controls more than ninety-five (95%) per cent. of the capital stock of the Chicago Telephone Company, and owns and controls many other local telephone companies throughout the United States, thus affording facilities to the American Telephone and Telegraph Company, and its subsidiary companies for the transmission of telephone communications among the several states of the Union.

We are advised that the Chicago Tunnel Company, owning the Automatic System has agreements covering interchange of long distance telephone business with three "Independent Companies" (as distinguished from the American Telephone and Telegraph Company) as follows:

1. Agreement with the Interstate Independent Telephone and Telegraph Company, expiring February 20, 1929. This company has lines in many of the important towns in Illinois and connects the lines of the Chicago Tunnel Company with St. Louis in the State of Missouri.

2. Agreement with the South Bend Home Telephone Company, expiring February 3, 1917. This company operates in the City of South Bend in the State of Indiana, leases the wires of the Postal Telegraph Company connecting South Bend with the wires of the Chicago Tunnel Company near the city limits of the City of Chicago.

3. Agreement with the Tri-State Telephone and Telegraph Company, operating at St. Paul and Minneapolis in the State of Minnesota, and using the wires of the Postal Telegraph Company between Chicago and those points. This contract expires February 19, 1914.

It is claimed that the facilities for long distance communications over the "Independent Companies" wires, do not afford adequate service for distances beyond one hundred (100) miles. The business actually done by the Chicago Tunnel Company with the Interstate Independent Telephone Company is entirely intra-state. Attempts to communicate with St. Louis, Missouri, over these lines have failed. The same situation exists as to the business done with the Tri-State Telephone and Telegraph Company, resulting in no business under the contract with that company.

Communications between South Bend, Indiana, and this city over the lines of the South Bend Home Telephone Company, the Postal Telegraph Company and the Chicago Tunnel Company, have, however, met with fair success, resulting in an average of *thirteen* messages daily for the past two or three years between the points mentioned, over these lines.

As compared with the Interstate communications carried over the lines of the Chicago Tunnel Company, the purely urban messages average 100,000 daily.

On June 2, 1913, an ordinance was introduced in the City Council of the City of Chicago, which was referred to the Committee on Gas, Oil and Electric Light, to amend the ordinance of February 20, 1899, under which the Chicago Tunnel Company is now operating, by striking therefrom the language hereinbefore quoted, prohibiting any sale to or agreement with any existing telephone company doing business in the City of Chicago, whereby competition would be rendered inoperative.

From a letter dated July 19, 1913, addressed to your committee by C. W. Hotchkiss, president of the Chicago Tunnel Company, it appears that on July 8, 1913, an agreement was reached between the Chicago Tunnel Company and the American Telephone and Telegraph Company, which, according to the statement of Mr. Hotchkiss, is "little else than an option to the American Telephone and Telegraph Company, to buy the telephone plant of the Chicago Tunnel Company at the price of \$6,300,000.00."

The question on which you desire to be advised is whether the sale of the telephone properties of the Chicago Tunnel Company to the American Telephone and Telegraph Company will be a violation of the Sherman Anti-Trust Law.

Section 1 of an act entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," (26 Stat. L. 209), commonly known as the Sherman Anti-Trust Law, is in part as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

That part of Section 2 of the same act, which is applicable to the question before us, is as follows:

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *

It will be seen upon a cursory reading of the Sherman Act, that it is aimed and directed against contracts, combinations, conspiracies or monopolies in restraint of *interstate* trade or commerce. The first question which presents itself for determination is, therefore, whether the contracting parties are engaged in interstate trade or commerce.

In the first case which arose in the Supreme Court of the United States under the Sherman Act, Mr. Chief Justice Fuller who delivered the opinion of that court (*U. S. v. E. C. Knight Co.*, 156 U. S. 1, 12) defined the term “commerce” by quoting what Chief Justice Marshall said in *Gibbons v. Ogden*, 9 Wheat, 1, as follows:

“Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”

Very early in the history of litigation under the Sherman Act, it was determined by the Supreme Court, that railroad corporations are affected by the act. Mr. Justice Peckham, who delivered the opinion of the court in the case of *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290, at page 312, said:

“Railroad companies are instruments of commerce and their business is commerce itself.”

See also:

United States v. Joint Traffic Assn., 171 U. S. 505.

Northern Securities Co. v. U. S. 193 U. S. 197.

United States v. Union Pac. R. R. Co., 226 U. S. 61.

In *Telegraph Co. v. Texas*, 105 U. S. 460, 464, the court said:

“A telegraph company occupies the same relation to

commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself."

There can be no question but that telephone companies just as railroad and telegraph companies are instruments of commerce, and their business is commerce itself. While no case has yet arisen in the United States Supreme Court wherein the Sherman Act was applied to a telephone company, there have been cases in the Federal Circuit Courts of Appeals, which appear to be so sound that there can be no doubt upon this point.

In *Muskogee Nat. Tel. Co. v. Hall*, 118 Fed. 382, 384, it is said:

"* * * but telephone companies are equally agencies of interstate commerce, and every reason which was or that may be assigned against the grant of a monopoly to maintain telegraph lines applies with equal force against the grant of such monopoly to a telephone company. Telephone companies, like telegraph companies, are common carriers of information, and their lines are daily employed in the transaction of interstate commerce."

In *United States Telephone Company v. Central Union Telephone Company*, 202 Fed. 66, 70, the court say:

"It also seems clear, and is not denied, that the carrying on of telephone business is trade and commerce within the proper meaning of those terms, and one of the kinds of business into which it is the general purpose of the law that all citizens shall be at liberty to engage on equal terms."

That the American Telephone and Telegraph Company, one of the contracting parties in this case, owns lines and wires through many states and is therefore engaged in interstate commerce is not questioned. But it is equally important to determine whether the Chicago Tunnel Company, whose ownership of wires is confined to the limits of the City of Chicago, or at least, not beyond the State of Illinois, is engaged in such commerce.

In this respect, we believe that the Chicago Tunnel Company is in the same position as the Stock Yards Company in

the case of *U. S. v. Union Stock Yards and Transit Company of Chicago et al.*, 33 S. Ct. 83.

The Stock Yards Company owned real estate, constructed and operated stock yards and constructed in the stock yards district about three hundred (300) miles of railroad track, consisting of main lines connecting with trunk lines entering Chicago, and a large number of switches to the various industries which had been established adjacent to such tracks. Afterwards the Stock Yards Company leased its railroad property to the Chicago Junction Railway Company. The Stock Yards Company continued to operate its stock yard facilities for loading and unloading cattle and other live stock bound for and coming from points outside of the state and to feed and water live stock in transit over the lines of trunk line carriers, and also to feed, bed and water live stock shipped to consignees doing business in the stock yards district. The Stock Yard Company also owned the equipment consisting of locomotives and rolling stock, but the Chicago Junction Railway Company operated the same employing its own engineers and crew.

On page 88, the court say :

“That the service is performed wholly in one state can make no difference if it is a part of interstate carriage. ‘The transportation of live stock,’ said this court in *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 Sup. Ct. Rep. 461, in treating of the duties of common carriers, irrespective of the act to regulate commerce, ‘begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee.’ * * * Nor does it make any difference that neither the Junction Company nor the Stock Yard Company issues through bills of lading. It is the character of the service rendered, not the manner in which goods are billed, which determines the interstate character of the service. * * *

Together, these companies, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the act, and perform services as a railroad when they take the freight delivered at the stock yards, load it upon cars, and transport it for a substantial distance upon its journey in interstate

commerce, under a through rate and bill furnished by the trunk line carrier, or receive it while it is still in progress in interstate commerce upon a through rate which includes the terminal services rendered by the two companies, and complete its delivery to the consignee."

And so, we believe that the Chicago Tunnel Company, together with the South Bend Home Telephone Company engage in interstate commerce when a citizen in Chicago communicates over the lines of the Chicago Telephone Company and its connecting line the South Bend Home Telephone Company with a citizen in South Bend, Indiana.

Having determined that both the American Telephone and Telegraph Company and the Chicago Tunnel Company are engaged in interstate commerce, let us now inquire whether the sale of the property of the Chicago Tunnel Company to the American Telephone and Telegraph Company is prohibited by the Sherman Act.

It is now well settled by the decisions of the United States Supreme Court in the Standard Oil case, the Tobacco case and the Union Pacific case, that every contract or business transaction which restrains trade or commerce between the states or with foreign nations, whether the restraint is reasonable or unreasonable, partial or total is *not* prohibited by the act. It appears from the decisions referred to that the Sherman Act must receive a reasonable construction; that such reasonable construction of the act renders it applicable only to *undue* or *unreasonable* restraints of interstate or foreign trade or commerce; that the standard of reason which is applied at the common law against combinations in restraint of trade or commerce or monopolization or attempts to monopolize any part of such trade or commerce is the measure to be used for the purpose of determining whether in a given case a particular act is or is not in violation of the Sherman Act.

Standard Oil Co. v. U. S., 221 U. S. 1.

U. S. v. Am. Tobacco Co., 221 U. S. 106.

U. S. v. Union Pacific Co., 33 S. Ct. 57.

But while the law upon this question is clear, the decisions referred to, in the opinion of a great many jurists in this country, render the application of the Sherman Act to a

particular case most difficult. In cases where the contracts, conspiracies or monopolies are vast in proportion, where they cover great industries and affect a large proportion of interstate commerce, the question is not so difficult to determine.

In this case, however, our inquiry is confined to the sale of property which is used in a very small degree in interstate commerce. We are not concerned with the question as to whether the general operations of the American Telephone and Telegraph Company, are in violation of the Anti-Trust Law. We have not the facilities for obtaining the information necessary to determine that question, even if it were submitted to us for determination. In *U. S. v. Reading Co.*, 226 U. S. 324, it was held that a general system of contracts may be obnoxious to the Anti-Trust Law, though the individual contract would not be.

It is undoubtedly the purpose and intent of the contracting parties that the telephone service in the City of Chicago shall be under one control. While the intent with which an agreement is entered into cannot be considered (*U. S. v. Freight Assn.*, 166 U. S. 290, 341), its effect upon interstate trade or commerce must not be *indirect* or *incidental* only, (*id.* page 568.) Thus, in the case of *U. S. v. E. C. Knight Co.*, 156 U. S. 1, it was held that a monopoly in the manufacture of sugar, although it was manufactured for export to other states, does not violate the Sherman Act, because interstate commerce is only *indirectly* affected by such monopoly.

In *Hopkins v. U. S.* 171 U. S. 578, 597, Mr. Justice Peckham says:

“Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted.

“* * * But in all the cases which have come to this court there is not one which has denied the distinction between a regulation which *directly* affects and embar-

rasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce.”

See also—

Addyston Pipe and Steel Co. v. U. S., 175 U. S. 211.

Northern Securities Co. v. U. S., 193 U. S. 197.

Field v. Barber Asphalt Co., 194 U. S. 618, 623.

Whether an agreement is in *direct* restraint of interstate trade or commerce or whether it is *indirect* or merely incidental or secondary is sometimes a difficult matter to determine.

In *Swift & Co. v. U. S.*, 196 U. S. 375, at the bottom of page 396, the court say:

“Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single state is an object of attack.”

If the data submitted by the Chicago Tunnel Company be taken as true, the *interstate* commerce affected by the sale of the properties in question will be less than one-fiftieth (1/50th) of one (1%) per cent. of the local business affected thereby.

In *Addyston Pipe and Steel Co. v. U. S.*, 175 U. S. 211, 228, the court says:

“Under this grant of power (to regulate commerce) to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to *directly* and not as a mere incident to other and innocent purposes, regulate to any *substantial* extent interstate commerce.”

In *Montague & Co. v. Lowry*, 193 U. S. 38, it was held that an association formed for the sale of tiles, mantels and grates which was so small “as to be negligible quantity,” is nevertheless in violation of the Sherman Act. But in that case *all* of the trade or commerce affected by the association was interstate.

In *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, at page 184 the court say:

“We will suppose then that the contract does not leave commerce among the states untouched. But even on this supposition it is manifest that interference with such commerce is insignificant and incidental, and not the dominant purpose of the contract, if it actually was thought of at all. The route mentioned is between Ohio ports. The contract, in what it especially contemplates, is a domestic contract and, so far it is so, is shown to be valid under the local law by the decision of the Ohio court. The chief and visible object of its provisions has nothing to do with commerce among the states.”

In this case the only interstate commerce which may at all be affected by a sale of the properties in question is that between the city of Chicago, Illinois, and the city of South Bend, Indiana. It is conceded that the only means of communicating between these two cities is either through lines of the Chicago Tunnel Company in connection with that of the South Bend Home Telephone Company or through the lines of the American Telephone and Telegraph Company in connection with that of the Chicago Telephone Company.

In construing the second section of the Sherman Act, Mr. Chief Justice White in rendering the decision in the *Standard Oil* case, *supra*, said:

“The commerce referred to by the words ‘in part,’ construed in the light of the manifest purpose of the statute, has both a geographical and a distributive significance; that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.”

Undoubtedly, a sale of the property of the Chicago Tunnel Company to the American Telephone and Telegraph Company will destroy *competition* in the telephone business between a part of the United States, that is, between Chicago and South Bend.

But in the case of *United States v. Joint Traffic Association*, 171 U. S. 505, Mr. Justice Peckham on page 575 conceded that “commerce” and “competition” are not identical, “because it is plain that commerce can and does take place on a large scale and in numerous forms without competition. The

material considerations, therefore, turn upon the effects of competition upon the business of railroads, whether they are favorable to the commerce in which the roads are engaged, or unfavorable and in restraint of that commerce."

It was held in the case last cited, as well as in the Northern Securities case and the Union Pacific case, heretofore referred to, that the elimination of competition between railroads tends to increase the cost of transportation, and results in the increase in the cost of the commodity transported, and therefore is in restraint of commerce.

The question whether the elimination of competition in the telephone business restrains trade or commerce, is, however, a debatable one. The telephone business is so developed that there can be no real competition unless there is a substantial duplication of service. A duplication of service increases the cost thereof, and may it not be said that such increase in cost brings about a *restraint* of commerce just as in the case of railroads, the increase of the cost of the commodity resulting from the *elimination* of competition is said to be in restraint of commerce?

In any event the question of whether the sale of the properties of the Chicago Tunnel Company to the American Telephone and Telegraph Company will violate the provisions of the Sherman Anti-Trust Law will depend upon the use of that property after its title will pass. If the properties now owned by the Chicago Tunnel Company are abandoned, there may be some force to the argument that the object and effect of the transfer in the light of subsequent events was to stifle competition between Chicago and South Bend and is therefore in restraint of interstate commerce. If, however, the telephone properties of the Chicago Tunnel Company are used in connection with the properties of the Chicago Telephone Company and the American Telephone and Telegraph Company that is to say, if connections are made between the two systems, the effect of the transfer of the property in question will be to open up new avenues of interstate commerce and therefore to *facilitate* instead of to *restrain* such commerce.

In *U. S. Telephone Co. v. Central Union Tel. Co.*, 202 Fed, 66, at page 70, the court said:

“Speaking generally, the policies of the state of Ohio, and of the United States, regarding restrictions of competition, are the same; if there are differences, they are immaterial here. The rule is that of the common law, declared for Ohio by the Valentine Act, and for the United States by the Sherman Act. * * * That any particular class of business should be exempted from this prevailing policy would require clear and explicit legislative declaration to that effect. The courts cannot make such exemptions, merely because forceful reasons can be stated why such particular business is a ‘natural monopoly’. If it is, this only means that the legislature might well have made an exemption, or, at most that in a judicial determination of what amounts to a substantial and direct restraint, rather than an incidental or indirect restraint, the courts will give due regard to the character of the business under consideration. * * *”

Giving due consideration to the character of the telephone business, and applying the rule of reason, announced in the Standard Oil case, to the facts before us, and assuming these facts to be true, we are of the opinion that the mere sale of the telephone properties of the Chicago Tunnel Company to the American Telephone and Telegraph Company will not *directly*, to any *substantial* extent, restrain interstate trade or commerce and, therefore, will not be in violation of the Sherman Anti-Trust Act.

Respectfully submitted,

JOS. F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 15, 1913.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO:

Gentlemen:

With reference to the order of your Honorable Body directing the Corporation Counsel to prepare and submit to you an ordinance requiring that all automobiles shall be slowed

down in speed at all street intersections in the City of Chicago, we beg to submit the following:

On November 16, 1911, this department, at the request of his Honor, the Mayor, rendered him an opinion on the power of the city to restrict the speed of automobiles at certain locations, and we adhere to the views expressed in that opinion which we quote below:

“NOVEMBER 16, 1911.

In re Restriction of Speed of Automobiles at Certain Locations,

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your request for advice as to whether it would be legal for the City, under its police powers, to restrict the speed of automobiles to four miles an hour at certain locations, was referred to me for an opinion.

Your inquiry has reference particularly to places where the ordinary course of this class of vehicles requires them to make a turn from one street into another, and you state that at such points the average chauffeur rounds the corner at full speed, making it almost impossible for pedestraints to cross the highways.

While this is apparently an instance where the general police powers of the municipality should be invoked, there seems to be no way of doing so in the face of the statute recently enacted relating to motor vehicles, except to the very limited extent I point out below.

Section 12 of this Act provides that, aside from local authorities having jurisdiction over public parks regulating the speed within them, no municipality shall have power to enforce any ordinance, ‘in respect to or limiting the use or speed of motor vehicles or motor bicycles,’ Another exception is made, as follows:

‘Provided, that nothing in this act contained shall be construed as affecting the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles and motor vehicles which are used within their limits for public hire, or from making and enforcing reasonable traffic and other regulations except as to rates of speed not inconsistent with the provisions hereof.’

The above proviso expressly limits the power to make and enforce reasonable traffic and other regulations so as to exclude any as to rates of speed.

This in itself is sufficient to deprive the city completely of any authority in this respect which it derives from any general grant of power, since the rule is that a general grant must give way when a subject is expressly and specifically legislated on in the same or another Act.

But in addition to this, and emphasizing this limitation on the powers of municipalities, Section 10 of the same Act sets forth specifically the intention of the legislature with regard to the point about which you speak.

The wording is as follows:

‘If the rate of speed of a motor vehicle or motor bicycle operated on any public highway in this State in going around a corner or curve in a highway where the operator’s view of the road traffic is obstructed exceeds six (6) miles an hour, such rate of speed shall be *prima facie* evidence that the person operating such motor vehicle or motor bicycle is running at a rate of speed greater than is reasonable having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person.’

From this it will be seen that, so far as the practical enforcement of the law is concerned, there is no restriction on the speed with which a chauffeur may take a curve in the most crowded or congested part of the city in case he does no damage, but if he injures persons or property then the fact that he was going around a corner where his view was obstructed faster than at a rate of six miles an hour furnishes *prima facie* evidence that the speed was not reasonable, and in the absence of rebutting evidence, would subject him to a fine.

The only method of dealing with the subject at dangerous corners, therefore, would be to pass an ordinance requiring automobiles to stop before making a turn of this kind on signal from an officer located at such crossing. This would doubtless be regarded as a reasonable traffic regulation. Anything beyond that, as for instance an ordinance requiring all automobiles to stop at such corners, would probably be held to be an unreasonable regulation. It is doubtful if even an ordinance authorizing the placing of signs requiring automobiles to slow up at certain points would hold, since that would involve either a delegation of authority or a discrimination.

It is possible, therefore, to provide protection only at

those dangerous corners where the traffic is great enough to warrant stationing an officer.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Corporation Counsel.”

Since the rendition of the above opinion, our Supreme Court in the case of *City of Chicago v. Shaw Livery Co.*, 258 Ill. 409, in referring to that proviso of section 12 quoted hereinabove which was added to the Motor Vehicle Act by the amendment of 1911, says, page 416:

“By the addition of the language last quoted to the act of 1911 the legislature has invested municipalities with the power and authority to make any regulation of the use of motor vehicles not inconsistent with the provisions of the act, except as to rates of speed.”

We are, therefore, of the opinion that an ordinance such as your Honorable Body has directed us to prepare and submit would be invalid.

Respectfully submitted,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 16, 1913.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation:

Dear Sir:

We are in receipt of your communication of the 8th instant in which you refer to a recommendation of the Board of Supervising Engineers in respect to subway construction in the congested districts, to the effect that subways be provided in certain localities to carry the street cars past places where

section and half section lines remain unopened as streets and are blocked by private occupancy, and requesting an opinion "outlining the manner in which the city would have to go about securing easements under or over such property for the subways and portals (or title to such property, if preferable) and the powers and limitations of the city with regard to same."

We assume that the subways referred to would be subways to be constructed primarily for and in connection with the operation of the cars of the surface street railway companies and to be constructed by or for the City of Chicago and to be owned by the city.

Section 1 of an Act of the General Assembly of the State of Illinois entitled, "An Act to authorize cities to acquire, construct, own, operate and lease street railways and to provide the means therefor," approved May 18, 1903, in force July 1, 1903, commonly known as the Mueller law, which act has been adopted by the City of Chicago, provides that every city of this state which shall adopt said act

"shall have the power to own, construct, acquire, purchase, maintain and operate street railways within its corporate limits, and to lease the same or any part of the same to any company incorporated under the laws of this state for the purpose of operating street railways for any period not longer than twenty years on such terms and conditions as the city council shall deem for the best interests of the public."

Said section also contains the following provision:

"In the exercise of the powers, or any of them, granted by this act, any such city shall have the power to acquire, take and hold any and all necessary property, real, personal or mixed for the purposes specified in this act, either by purchase or condemnation in the manner provided by law for the taking and condemning of private property for public use * * *"

In the case of *Barsaloux v. City of Chicago*, 245 Ill. 598 the Supreme Court had under consideration the question whether the words "street railways" used in section 1 of the Mueller law should be held to include street railways constructed beneath the surface of the streets, as well as street railways built on the surface of the streets or elevated above

them. The court in its opinion, after discussing certain authorities, said on page 607:

“Under these authorities the words ‘street railways,’ used in the first section of the Mueller law, must be held to include street railways built either on the surface of streets or elevated above them. If the public interest should require that all or a portion of the street railways of the city should be constructed beneath the surface of the streets, no valid reason is perceived why the power to meet such public necessity should be denied in respect to such subways that does not apply with equal force to surface and elevated street railways.”

And in concluding the opinion the court on page 612 said:

“Our conclusion is that the city has the power to acquire or construct street railways, and that ‘street railways,’ properly constructed, mean elevated, surface or underground railways; * * *”

It will be observed that the power conferred on cities by the Mueller law to acquire property for the purposes specified in the act is limited to “any and all necessary property, real, personal or mixed for the purposes specified in this act.”

If, therefore, any property should be sought to be acquired by the city either by purchase or condemnation for the purpose of constructing, maintaining or operating street railways the city’s right to so acquire the property would turn upon the question whether said property was necessary for the purposes specified in said act.

In section 1 of an Act entitled, “An Act in regard to street railroads and to repeal certain Acts herein referred to.” approved and in force March 7, 1899, which is substantially a reenactment with (certain additions) of an Act entitled, “An Act in regard to horse and dummy railroads” approved March 19, 1874, commonly called the “Horse and Dummy Act,” it is provided that any company incorporated under the general laws of this State for the purpose of constructing, maintaining or operating any horse, dummy or street railroad or tramway,” may enter upon and appropriate any property necessary for the construction, maintenance and operation of its road, and all necessary siding, side tracks, and appurtenances * * *

Section 2 of said Act of March 7, 1899, is as follows:

“When it is necessary for the construction, maintenance or operation of such road, or the necessary sidings, side tracks or appurtenances, to take or damage private property, the same may be done, and the compensation therefore may be ascertained and made in the manner which may be then provided by law for the exercise of the right of eminent domain.”

Our Surpeme Court has considered in several cases the question of the “necessity” which must be shown to warrant the condemnation of private property under the Horse and Dummy act or the above mentioned Act of March 7, 1899 in regard to street railroads.

In the case of *Harvey v. Aurora and Geneva Ry. Co.*, 174 Ill. 295, the court, after stating that a street railroad was a railroad constructed on a street or highway for the purpose of conveying passengers living upon or having business on such street or highway, its main object being to accommodate street travel, says on page 308:

“If, in the construction of the road in the highway, difficulties or obstructions were encountered which rendered it impracticable to construct the road in the highway, a necessity might arise, within the meaning of the law, which would authorize the company to leave the highway and go upon private property until the difficulty encountered was overcome, when a return could be made to the highway;”

And again on page 309:

“In the construction of the road, if a necessity existed for making a deflection from the highway in order to avoid a heavy grade which would prevent a successful operation of the road, defendant in error would no doubt have the right to take and condemn private property to obviate the difficulty.”

In the case of *Aurora and Geneva Ry. Co. v. Harvey*, 178 Ill. 477, the court in dealing with this question said on page 484:

“Second—Counsel for appellees contends that the ‘necessity’ required by the statute in relation to horses and dummy railroads, means an ‘absolute necessity,’—a necessity so great that in the case at bar, if it is physically possible for appellant to construct and maintain its railroad upon the highway there is no right to condemn. We

do not think such a strict interpretation should be placed upon the language of the statute. In the former opinion herein referred to we said: 'If, in the construction of the road in the highway, difficulties or obstructions were encountered which rendered it *impracticable* to construct the road in the highway, a *necessity* might arise, within the meaning of the law, which would authorize the company to leave the highway and go upon private property.' And again: 'In the construction of the road, if a necessity existed for making a deflection from the highway in order to avoid a heavy grade which would prevent a successful operation of the road, defendant in error would no doubt have the right to take and condemn private property to obviate the difficulty.' The safety, comfort and convenience of the traveling public require protection and the policy of the State must be to compel railroad companies to so build their roads as to conserve the safety of its citizens to as high a degree as is reasonably attainable in view of the character and exigencies of that mode of transportation. In the construction of statutes relating to the taking of private property the word 'necessary' should be construed to mean 'expedient,' 'reasonably convenient' or 'useful to the public,' and cannot be limited to an absolute physical necessity. This, we think, was certainly the intention of the legislature when the act was passed. The view here expressed seems to be well supported by the authorities."

The doctrine laid down in the two last mentioned cases has been reaffirmed in the following cases:

Dewey v. C. & M. Elec. Ry. Co., 184 Ill. 426.

Harvey v. Aurora & Geneva Ry. Co., 186 Ill. 283.

Knopf v. Lake Street El. R. R. Co., 197 Ill. 212.

Eddleman v. Union County Traction Co., 217 Ill. 409.

We are of the opinion that if the city council by ordinance provides for the construction of a subway for street railroads which subway and the operation of street railroads therein would be in furtherance of the safety, comfort and convenience of the traveling public and should run mainly through the public street and the practicability of the subway for the safe, comfortable and convenient operation of street railroads therein should require that comparatively small sections thereof should be constructed upon or under the surface of private property, then the city would have the right to acquire by

purchase or condemnation such property or interests therein as would be necessary for the construction of the subway, including portals and other appurtenances.

If the compensation to be paid for the property sought to be appropriated or damaged for the purposes above mentioned could not be agreed upon by the parties interested, then the city would have the right to proceed to acquire the same by condemnation. The procedure for condemning the property or interests required would be that provided in the Eminent Domain act for taking or damaging private property for public use.

The foregoing would apply to private property irrespective of whether the property sought to be acquired should lie in the line of a street and would constitute a part of the street if the street should be extended through such property. If the property sought to be taken lies in the line of a street and the municipal authorities should be of the opinion that the public interest called for the opening or extension of the street through such property, the city would have the right to open and extend the street through such property. In such case the proceeding for taking the property required for the extension of the street would be that provided in the Local Improvement act. If the street should be extended through such property the city could then construct the subway through or under the same in like manner as in other streets.

Yours respectfully,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

JOHN M. BECKWITH,
First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

DECEMBER 22, 1913.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation:

Dear Sir:

Your communication of the 11th inst. requesting an opinion as to the power of the city to compel the South Side

Elevated Railroad Company to enclose its station platforms, has been referred to me for reply.

If the city has power to compel this company to enclose its station platforms, the same is derived from the following clauses of the Cities and Villages Act, (Hurd's Revised Statutes 1911, Chapter 24, Section 62) :

"42. To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupation, and to prescribe their compensation."

"66. To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

"78. To do all acts, make all regulations which may be necessary or expedience for the promotion of health or the suppression of disease."

"98. To pass all ordinances, rules, and make all regulations, proper or necessary, to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper: *Provided*, No fine or penalty shall exceed \$200. and no imprisonment shall exceed six months for one offense. (As amended by Act, approved June 5, 1911. In force July 1, 1911. L. 1911, p. 173.)"

It may be well here to state that the police powers of a city cannot be contracted away and that the contract ordinances of the elevated railroad companies in no way preclude the city from passing and enforcing reasonable police regulations.

City of Chicago v. Chicago Union Traction Company,
199 Ill. 259.

In this connection it must also be noted that the ordinance passed March 26, 1888, and accepted May 24, 1888, by the Chicago and South Side Rapid Transit Company to which the South Side Elevated Railroad Company is the successor, contains the following section :

"8. City to Regulate Speed, Heating of Cars, Depots, etc.) §8. The City of Chicago reserves to itself the right of regulating by ordinance the rate of speed at which the said trains shall run, and also the right to regulate the heating of cars and depots, and also the right to impose such regulations as the council may deem necessary for the protection and safety of the public."

In addition, Section 4 of "An Act in regard to street railroads," (H. R. S., 1912, Chapter 131a) is as follows:

"4. Control of Streets Reserved—Police Powers.)

§4. Every grant to any such company of a right to use any street, alley, road, highway or public ground shall be subject to the right of the proper authorities to control the use, improvement and repair of such street, alley, road, highway or public ground, to the same extent as if no such grant had been made, and to make all necessary police regulations concerning the management and operation of such railroad, whether such right is reserved in the grant or not."

There being no power, which, in express terms authorizes the city to require elevated roads to enclose their station platforms, an ordinance requiring this must be a reasonable exercise of the city's police power. As to what regulations are a reasonable exercise of this power, I shall now refer to various cases in which ordinances of a similar character to the one here under consideration have been sustained.

In the case of *City of Chicago v. The Chicago Union Traction Company*, 199 Ill. 259, an ordinance requiring street railway companies to remove all snow, dirt or other accumulations from so much of the surface of the street as is occupied by their tracks, was sustained.

In *Conrad v. Springfield Railway Company*, 240 Ill. 12, an ordinance requiring guard wires over electric cables at points where they are crossed by wires of other concerns was held to be a valid exercise of the police power of the city. In *C. & J. E. Ry. Co. v. Freeman*, 125 Ill. App. 318, an ordinance requiring fenders upon traction cars was in part sustained and held reasonable. The court held that the provision of the ordinance requiring the fenders to be placed not more than two inches from the ground or surface of the street was unreasonable.

In *People v. Detroit United Railway Co.*, 134 Mich. 682, the court sustained the validity of the following ordinance:

"Section 1. On and after May 1, 1902, no street car or cars shall be operated or run on any street, avenue or highway in the City of Detroit unless the same shall be equipped with air or electric brakes."

Although evidence was introduced to show that it would

cost \$350,000.00 to equip the cars with the prescribed brakes, the court said, page 688:

“We do not feel called upon to say much about the claim that this ordinance should be held invalid upon the ground that it will require a large outlay, or that it takes property without due process of law. It is too well settled that the State or City may enforce regulations clearly looking to the safety of the public, and reasonably adapted to such end, to make it necessary. All property is held subject to the exercise of the police power.”

In *State v. Smith*, 58 Minn. 35, an act requiring street railway companies to provide each car with an enclosure constructed of wood, iron, and glass or similar suitable material sufficient to protect employees from the exposure of the inclemency of the weather, but not so as to obstruct the vision of the person operating the car, at all times between November 1st and April 1st in each year was held to be a valid exercise of the police power of the State.

In *State v. Nelson*, (Ohio) 39 N. E. 22, the court sustained the validity of a statute requiring every electric street car to be provided during the months of November, December, January, February and March of each year with a screen constructed of glass or other material to protect the driver from wind and storm.

In *State v. Whittaker*, 160 Mo. 59, and in *Beaumont Traction Company v. State of Texas*, Civ. App., 576, similar acts requiring protection from the elements for motormen of street cars were sustained as valid exercises of the police power.

We are of the opinion that an ordinance may be drafted requiring elevated electric railroads to equip their station platforms with storm enclosures during the winter months if a reasonable time is given such companies within which to provide the same. It is well known that platforms stationed high in the air with no shelter or protection from the ravages of the elements subject those using the same to great danger and are a detriment to the health. An ordinance having for its purpose the protection of the people from such dangers, may be passed by the city if it reasonably tends to remedy or relieve such situation, and an ordinance requiring the ele-

vated railroad companies to provide storm enclosures on three sides of their station platforms would do so.

Such an ordinance, to be free from the objection of discrimination, would have to necessarily apply to all elevated electric railroad companies, and the draft of an ordinance which we submit herewith does so.

Respectfully submitted,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

JANUARY 2, 1914.

HON. RAY PALMER, City Electrician.

Dear Sir:

Your letter of the 24th ult., requesting information as to whether you may accept the bid of the Holophane Works of the General Electric Company, duly received. Accompanying said bid is a bank draft by The Cleveland Trust Company, Cleveland, Ohio, on The Bankers Trust Company, New York, payable to the order of the said Holophane Works of the General Electric Company and by them indorsed to Ray Palmer, City Electrician, Chicago, Illinois.

Your advertisement for bids, in compliance with section 2105 of the Chicago Code of 1911, provides, as follows:

“Each proposal for the same must be accompanied with five (5) per cent of the amount of such proposal in money or certified check on some responsible bank doing business in the City of Chicago, which check must be payable to the City Electrician. * * *”

The bid not being accompanied by money or a certified check on some responsible Chicago bank, the question arises: Is it within your power to accept the bid otherwise regular?

In awarding contracts for public works, where the law provides that they should be awarded to the lowest responsible bidder, the text books agree that a wide latitude is allowed the officers of the municipality in determining who is the lowest responsible bidder, and their *bona fide* judgment

based upon facts tending reasonably to support their determination will not be disturbed by the courts:

McQuillin on Municipal Corporations, Sections 1227-8.

Dillon on Municipal Corporations, Section 811.

Where the right is reserved to reject any and all bids, the courts will not interfere with the officers' prudent judgment:

See McQuillin on Municipal Corporations, Sec. 1229.

This being true, as a general proposition, it seems that rule would apply, *(a fortiori)*, in a case where it would be to the best interests of the city to accept the bid of the lowest responsible bidder, although the same may, perhaps, be tinged with a slight irregularity through which the city cannot in any plausible manner be damaged.

In the case of *Cady v. City of San Bernardino*, 153 California, 24, 28, where the bidder neglected to accompany his bid by certified check, the court said, at page 28:

“* * * the requirement that a certified check for ten per cent of the amount shall accompany the bid is one wholly for the benefit of the city, to avoid possible loss in the event that the successful bidder should refuse to enter into the contract, thus, perhaps, entailing the necessity of re-advertising. * * *”

In the case of *McCord v. Lauterbach*, 86 N. Y. Supp. page 503, the requirements of the law that the bidder should accompany his bid with a formal bond to insure the acceptance and the fulfillment of the contract, and it appeared that the bond was not in compliance with the formality required, and further appearing that the bidder was a responsible party who could comply with any reasonable requirement, and that the awarding of the bid would benefit the city, the courts refused to entertain an injunction restraining the awarding of the bid,—since the requirements were for its benefit, it might waive such irregularities. In this case, the court says, at page 507:

“* * * Nor can the statements of the sureties as to their qualifications be justified; but, admitting these things, are the irregularities sufficient to call upon the trustees to reject this bid under the penalty of being guilty of an illegal official act if they act upon it. That

it is to the pecuniary advantage of the city so to act is undisputed, and the city ought not to be deprived of the right thus presented to make an advantageous contract, unless a controlling rule of law interposes to compel it. All of the provisions, both of the statute and of the rules and regulations which have been adopted for procuring genuine bids and responsible parties, are in the main for the benefit of the city, and in order to prevent frauds upon it. They have not been adopted for the protection of the bidder but for the protection of the city, and it necessarily follows that the city, to some extent, at least has the right to waive irregularities when it is clearly for its benefit so to do, and when no damages will be inflicted upon it, or wrong done to others thereby. In the present case there is no claim that there was any collusion or fraud between the bidder and the city or those advertising for bids. The fraud which is averred to exist, is such as arises out of the transaction itself, and it comes into being by operation of law, if at all. There is no pretense that any fraud or collusion existed as matter of fact, and, such being the case, it would seem to follow that no one can be injured by the trustees acting upon this bid and executing the contract.* * *

This latter case has been followed by *Gage v. City of New York*, 97 N. Y. Supp. 157, 162, where the court said, with reference to an informality in the bond accompanying the bid:

“* * * At most it was irregular; but the irregularity could be waived (*McCord v. Lauterbach*, 91 App. Div. 315, 86, N. Y. Supp. 503), and we think it was the duty of the commissioner to waive it, and receive this proposal which was \$200,000 lower than any other submitted.”

The case of *People v. Contracting Board*, 46 Barbour, (N. Y.) 254, the facts were, as appear by the finding of the judge:

“* * *. that on the 28th day of November, 1859, the contracting board, consisting of the canal commissioners, state engineer and surveyor, and the auditor of the canal department, caused a notice to be published advertising for sealed proposals for keeping in repair certain portions of the Erie canal, for three years. That the relator sent in sealed proposals, which were the lowest. That it was required by the said notice that ‘all proposals must be accompanied by a certificate of deposit in some banking institution in good credit, within this state, certifying that the sums of money above specified, have been

deposited in said institution to the credit of the auditor of the canal department.' That the proposals of the said relator for section No. 5 were accompanied by a certificate of deposit certifying that the relator had deposited in the Mohawk Valley Bank, (the requisite sum,) to the credit of himself, which certificate was indorsed by said relator as follows: 'Pay N. S. Benton, auditor, &c. or order.' That the said bank was in good credit in this state, and N. S. Benton was then auditor of the canal department. The sole ground of the rejection of the relator's bid, although the lowest, was the pretense that a certificate of deposit to his own credit, and indorsed by him to the auditor or his order, did not comply with the terms of said notice requiring all proposals to be accompanied by a certificate of deposit 'to the credit of the auditor of the canal department,' and that on that ground the defendants refused to award the contract for such repairs to the relator."

Notwithstanding the irregularity in compliance with the bid, the court held that "the certificate of deposit conformed, in substance, if not absolutely in form, to the requirements of the notice and gave to the contracting board the whole benefit of the deposit, equally as if it had been in every respect formal. * * * He was entitled to it as a matter of right and of law."

The requiring of a deposit is a formality for the purpose of assuring the city that the lowest bidder will come forward and comply with the contract,—

Smith v. City, 2 Brewster, Pennsylvania, 433.

It has also been held that a mere irregularity in a bid for a municipal improvement which does not injure or mislead will not justify its rejection by a municipal body charged with the duty of awarding a contract to the lowest responsible bidder, where the bid appears to have been in substantial compliance with the specifications,—

Sweitzer v. Bd. of Education of N. Y., 75 Atl. 477.

The deposit in the case in question is a New York bank draft, drawn by one bank on another and the security thereby given is manifestly a better security than a certified check. Under the circumstances, it would seem to be that the draft with the bid under consideration is greater security than if there had been deposited a certified check, as required by the advertisement.

If, therefore, in your discretion, you shall determine the City is benefited by the acceptance of this bid, it is our opinion, in view of the reasoning of the above decisions, that, acting in good faith your judgment in this regard will not be disturbed although the check is not certified nor drawn on a Chicago bank. It would always be well, before accepting a bid accompanied by security not exactly in conformity with the requirements of the advertisement, to be assured that the City is amply protected, and benefited by the acceptance thereof.

Very truly yours,

LOUIS SALINGER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 3, 1914.

HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

Your letter of the 18th instant with reference to the question of runners at the Union Depot has been handed to the undersigned for reply.

You enclose reports of M. W. Delaney, Sergeant of the Vehicle Bureau, and Captain Meagher, commanding the 14th District, in which they call attention to the abuses and impositions on the public by these various runners. Among the abuses complained of are:

First, that these runners wear uniforms, coats and caps, bearing the letters "R. R." for restaurant runners, decorated with gold braid and initials, similar in design to those worn by employes of the railroad. Travelers and strangers do not hesitate to confide in these runners, and frequently trust them with their money, many times being defrauded thereby.

Second, that runners blockade the sidewalks in front of the Union Depot during rush hours and cause congestion, and by beckoning, soliciting, etc., harrass the public.

You ask for an opinion as to (a) whether you may keep these runners away from the middle of the sidewalk and on the curb; (b) whether you have power to stop them from

calling and beckoning to travelers, and (c) whether it is possible to designate on which side of the street they are to stand.

Section 2230 of the Code of 1911 provides for an appointment of a Board of Inspectors of Public Vehicles, and provides, among other things, that "said Board shall exercise such supervision as is necessary over all licensed runners for the purpose of *preventing* such runners from violating any of the provisions of this chapter or any other ordinances now or hereafter in force relating to runners."

It is by this provision made the duty of the Board of Inspectors of Public Vehicles to see that these runners do not violate any of the provisions of the said sections 2222 to 2231 aforesaid, and if any authority at all is given to the Police Department to regulate their said business it must be found in this section. It is, however, a serious question in the mind of the writer as to whether this section can be stretched far enough to cover the various abuses complained of and to require submission to the various regulations which your department would like to enforce.

Among the prohibitions of said sections 2222 to 2231 are the following:

"2228. No person acting as a runner under the provisions of this chapter shall * * * be guilty of any misrepresentation, deceit or fraud toward any person. * * *"

The wearing of uniforms and hat bands with the letters "R. R." similar to those worn by railroad employes has a tendency to deceive travelers and strangers, making it appear that the wearers thereof are representatives of the railroads. If, therefore, by any inference the intendments of section 2230 can be construed to grant power to make regulations to prevent misrepresentations, deceit or fraud toward any person, the Board may, on these grounds, provide that no such badges, uniforms or bands shall be worn.

With reference to the second complaint, that is, that these runners are continuously standing on the sidewalks blockading the same and molesting the public and strangers by soliciting for their business. We believe that the Board may, under said section 2230, rule that these runners must

stand a certain distance from the depot or within such reasonable distance as the Board may think necessary to prevent a violation of section 2229 of said Code. This section provides:

“No person acting as a runner under the provisions of this chapter shall * * * be guilty of any act, calculated to disturb the peace or good order of the city, or to harrass, vex or disturb travelers or citizens.”

Should any one or more of the runners refuse to comply with the rules of the Board, a proper recommendation being made to the Mayor, the runners' licenses granted to the violators may be revoked at the Mayor's discretion. We are of the opinion that if such rules or regulations are made they may perhaps be sustained by our courts as incidents to the powers granted to said Board to prevent violations of the provisions of said sections 2228 and 2229. If the courts should rule otherwise, the Code may be amended to guard against said abuses.

Yours truly,

LOUIS SALINGER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Acting Corporation Counsel.

JANUARY 8, 1914.

HON. GEORGE WESTON, Member of Board of Supervising Engineers (Representing City of Chicago), 105 South La Salle St., Chicago.

Dear Sir:

We are in receipt of your communication of the 30th ult. requesting an opinion as to the right of the Chicago Railways Company, under its corporate power, to utilize its surplus converting apparatus located in its sub-stations for converting electric energy in the form of alternating current into electric energy in the form of direct current, and delivering same for the use of the Commonwealth Edison Company at a certain price per kilowatt.

The Chicago Railways Company is by its charter from the State authorized to maintain and operate by electricity and by other means therein specified a street railroad system.

The operation of a street railroad by electricity being within the express terms of the company's charter it is perfectly clear that the manufacture of electric current by the company and the acquisition of the proper apparatus therefor is within the scope of the company's express powers.

In providing apparatus for the production of electric current the company is not limited to providing apparatus sufficient only for its present or ordinary requirements. It has the right to make provision for its reasonably anticipated future or contingent requirements, and may utilize its surplus apparatus, not required for its own immediate needs, to supply the needs of a third person.

In the case of the *People v. Pullman Car Co.*, 175 Ill. 125, it was charged that the Pullman Company furnished the Allen Paper Car-Wheel Company with steam power to operate the machinery of the latter company and received a large income therefrom. The Pullman Company averred in reply that when its manufacturing plant was built the company put in a very large system of boilers for generating steam with a view of anticipating its probable future wants, and that the steam power which said boilers were capable of producing would be no more than would be required in the future for the successful operation of the machinery of its plant, but that up to the time of the proceeding in question more steam had been generated than the Pullman Company's use required and that the surplus had been furnished to said Car-Wheel Company.

The Supreme Court on page 158 of its opinion said:

"It is entirely competent and proper for a corporation to keep in view its probable future wants and necessities, and in constructing its buildings and purchasing machinery to anticipate and provide for that which sound practical judgment and wise forethought indicate will be required by the growth of its business and the extension of the volume of its operations. It being lawful to purchase boilers having a capacity to generate more steam than the immediate needs of the company required, the law has no rule which would require that the excess of steam so provided should not be utilized but should be allowed to go to waste. It was but true economy, and in no sense a usurpation of power, to dispose of the ex-

cess of steam so produced to the Allen Paper Car-Wheel Company."

It was also held in the case cited that the Pullman Company, under a grant of power to acquire and hold such real estate as should be deemed necessary for the successful prosecution of its business, was authorized to erect a building (the Pullman Building) for its headquarters in Chicago, of sufficient size to meet its probable future needs for office rooms, and to rent what was not needed for its immediate use.

The doctrine laid down in the Pullman Company case is referred to with approval in:

Rector v. Hartford Deposit Co., 190 Ill. 380-387.

People v. Shedd, 241 Ill. 155, 164.

Cook on Corporations (6th Ed.), Sec. 681.

Of course the corporation's course in providing apparatus in advance of its present or ordinary requirements must be taken in good faith and not as a mere evasion of the law in respect to the limitations on the company's corporate powers.

Mr. Gurley's letter of September 29th to the board of supervising engineers, a copy of which is attached to your communication, states the surplus apparatus which is to be used for the "conversion service" has not been acquired by the company for commercial purposes, but "to meet all contingencies which the company might encounter."

Assuming that Mr. Gurley's statement is correct, we are of the opinion that the Chicago Railways Company has the authority under its charter to use the surplus apparatus hereinabove referred to for the purpose contemplated in the "conversion service" contracts, above referred to, and that there is nothing in the company's ordinances which forbids it to use its said surplus apparatus for such purposes.

Please note that in this communication we deal only with the legal question of the Chicago Railways Company's power to use its surplus apparatus for the purpose contemplated in the contracts. We are not informed concerning and do not pass upon other matters involved—such as good faith of the Railways Company in acquiring and retaining the surplus apparatus, the adequacy of the compensation to be paid to the Railways Company for the service to be rendered and

the policy involved in the furnishing of this service by the Railways Company to the Commonwealth Edison Company.

Yours very truly,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 12, 1914.

HON. JAMES DONAHOE, Chairman, Judiciary, State Legislation, Elections and Rules, Committee.

Dear Sir:

In reply to your request for an opinion as to the form of an ordinance transmitted with your request, I beg to submit the following:

Section 1 of the ordinance excepts "flat buildings of three flats or less used for residence purposes only." Such classification appears to be subject to objection when the purpose of the ordinance is considered, for there seems to be no reason why a flat building of three flats of ten rooms each should be excepted, but a flat building of four flats each should not be excepted. In drafting a substitute ordinance, which I enclose herewith, I have substituted a classification which in effect accomplishes the same results, but appears to me to be less objectionable.

Other objections to the ordinance submitted by your committee are also provided for in the substitute ordinance submitted herewith.

Section 3 of the ordinance makes a violator of the same only subject to a penalty upon failure to comply with same within thirty days after written notice is served by the fire marshal. Although the section also makes it mandatory for the fire marshal to serve such notice, this provision is objectionable for the reason that it makes the violation dependent upon failure to comply after service of notice so to do instead of making it a violation not to comply. This section further provides, that any one furnishing gas for a longer period than thirty days after a conviction for a violation unless the ordi-

nance is complied with, and is, in my opinion, unreasonable to that extent, and the validity of such requirement is questionable.

Since the act of the legislature relating to this subject has been declared unconstitutional, we are of the opinion that the City Council may pass an ordinance regulating this subject, if reasonable, under the police powers of the city. The enclosed draft of an ordinance in substitution for the one submitted, we deem reasonable.

Respectfully submitted,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 12, 1914.

TO THE HONORABLE, THE CITY COUNCIL, OF THE CITY OF CHICAGO.

Gentlemen:

On December 29, 1913, your Honorable Body passed the following order, appearing in the Journal of the City Council, page 3237:

“ORDERED, That the Corporation Counsel be and he is hereby directed to investigate the question as to whether the City may, by ordinance, prohibit smoking in theaters during the performances, and if so, then the Corporation Counsel is directed to prepare and submit to the Council, an ordinance prohibiting smoking in theaters during performances.”

As a police regulation in the interest of the good order and well being of the community, an ordinance prohibiting smoking in theaters during performances appears to be reasonable.

We direct your attention to Section 326b of an ordinance Creating a Bureau of Fire Prevention and Public Safety, passed July 22, 1912 (Council Journal, page 1617), which provides in effect that the Chief of Fire Prevention and Public Safety may prohibit smoking in any building if in his opinion the occupancy of same is such as to make it hazard-

ous to permit smoking therein. The validity of this provision is very questionable since the rendition of the opinion by our Supreme Court on December 17, 1913, in the case of *Sheldon v. Hoyne*, in which the Gas Safety Appliance Act was held unconstitutional for the reason that it delegated authority to the fire marshal and therefore was not uniform in its operation.

It is a matter of common knowledge that although theaters are now required to be of fire proof construction wherefore the danger of destructive fire is minimized, yet the probability of injury or loss of life by fire itself is not comparable with the probability of same from possible panics started by perhaps but a small blaze. It needs no argument to support the conclusion that the chances of such a blaze starting are greatly increased if smoking is permitted.

We are of the opinion that the draft of an ordinance submitted herewith is reasonable and that it is within the power of the city to enact and enforce the same.

Respectfully submitted,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 13, 1914.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Replying to the inquiry of James Gleason, General Superintendent of Police, as to whether it will be possible for police officers in full uniform to ride on trains without paying fare, since the public utility law has gone into effect, which inquiry was transmitted by you to this department under date of December 20, 1913, I beg to state as follows:

Section 1951 of the Chicago Code of 1911 provides:

"Any officer or member of the department of police, when in the performance of his official duty, may produce or show his badge to any conductor or collector of fares upon any railroad train, street car, carette, omnibus or other vehicle used for the purpose of carrying pas-

sengers for hire within the city, and, when so presented, it shall be the duty of any such conductor or collector of fares, as aforesaid, to carry free of charge such officer or member of the department of police, aforesaid, from and to any point or points within the city."

There are also, in some of the ordinances for extensions of the elevated railroads, reservations providing for carrying policemen and firemen free, but these apply only to the extensions therein provided for. I am of the opinion that section 1951, hereinbefore quoted, is not in conflict with the Public Utilities Act and can still have the same application and enforcement from and after January 1, 1914, that it has had prior thereto. This conclusion, I believe, can be fully sustained from a consideration of the Public Utilities Act itself.

Section 38 of the Public Utilities Act provides, in part, as follows:

"No public utility shall, as to rates or other charges, services, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. * * *"

Section 39 provides:

"No public utility, or any officer or agent thereof, or any person acting for or employed by it, shall, directly or indirectly, by any device or means whatsoever, suffer or permit any corporation or person to obtain any service, commodity, or product at less than the rate or other charge then established and in force as shown by the schedules filed and in effect at the time. No person or corporation shall, directly or indirectly, by any device or means whatsoever, whether with or without the consent or connivance of a public utility or any of its officers, agents or employes, seek to obtain or obtain any service, commodity or product at less than the rate or other charge then established and in force therefor."

It is by the two sections (38 and 39), above quoted, that the railroads and other transportation companies are forbidden to issue passes or grant free transportation, but I think it is quite clear that neither of these sections apply to municipalities. It will be observed from section 38, as hereinbefore quoted, that the Public Utilities Act forbids any public utility

to grant "any preference or advantage to any *corporation or person*," and further forbids any public utility to subject "any *corporation or person* to any prejudice or disadvantage."

Section 39 forbids any officer or agent of a public utility to furnish any service to "any *corporation or person*" at less than the scheduled rates, and further forbids any "*person or corporation*" to "seek to obtain or obtain any service" at less than the established rate. It will be observed that the discriminations, preferences and advantages above forbidden and prohibited are discriminations, preferences or advantages "to any *corporation or person*." What then is the meaning of "corporation" and what is the meaning of "person"? In section 10 of the Public Utilities Act, these terms are defined as follows:

"The term 'corporation,' when used in this Act, includes any corporation, company, association, joint stock company or association, *but not municipal corporations*."

"The term 'person,' when used in this Act, includes an *individual, firm or co-partnership*."

From these definitions it is clear (1st) that "municipal corporations" are excluded from the definition of "corporation," and (2d) that a municipal corporation cannot reasonably be comprehended in any of the terms "individual," "firm" or "co-partnership" contained in the definition of "person."

I am, therefore, of the opinion that sections 38 and 39 do not apply to, and that the State Public Utilities Commission so far as these sections are concerned has no jurisdiction over, the question of carrying policemen, while on duty, free of charge; and further, that section 1951 of the Chicago Code of 1911 has the same force and effect since January 1, 1914, that it had prior thereto.

Before making any changes in the rules or regulations of the Police Department, I suggest that in all cases where railroads or other transportation companies have refused to carry policemen in full uniform and while on duty free, steps be taken to convince the representatives of said companies that the above view of the law is correct and that the prac-

tice of carrying policemen free, which has hitherto been observed, should continue.

I return herewith the memorandum of the General Superintendent of Police, referred to in your letter.

Respectfully submitted,

JAS. G. SKINNER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 13, 1914.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

Under date of December 31, 1913, you transmitted to this department, and asked for an opinion thereon, a copy of the communication dated December 27th and addressed to you by C. E. Patten, General Agent of the Northwestern Elevated Railroad Company. Mr. Patten's communication sets forth that for some time past the elevated railroads have honored City employe tickets issued by the Department of Finance and rendered bill at the rate of four cents per ticket, with the exception of the South Side Elevated Railroad Company, which has rendered bill at the rate of five cents per ticket; and further advises you that, owing to the provision of the public utilities law, the elevated railroad companies on and after January 1, 1914, could not carry employes of the City at reduced rates.

Upon investigation, so far as I am able to ascertain, I find that the arrangement above referred to arose some years ago from a verbal understanding between the then city officials and the companies. No contract of definite duration exists, but it seems to be a practice which has been adopted and followed as a business arrangement of convenience to both the City and the companies, which either party is at liberty to abandon at any time. So far as my information goes, there is no law or general ordinance upon the subject. Section 1951 of the Chicago Code of 1911 requires railroads, street cars, cassettes, omnibuses or other vehicles to carry free of charge

members of the Police Department, and in some of the ordinances which provide for extensions of certain of the elevated railroads there are provisions requiring these companies to carry policemen and firemen free on such extension, while in full uniform, but the section referred to, and these provisions, are not broad enough to meet the situation presented in your communication.

The solution of the question, I believe, is to be found in the Public Utilities Act itself, which does not, as I construe it, prohibited or prevent the companies from continuing the arrangement that has heretofore existed.

I presume that Mr. Patten has in mind the provisions contained in sections 38 and 39 of the Act. Section 38 of the Act is, in part, as follows:

“No public utility shall, as to rates or other charges, services, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. * * *”

Section 39 provides:

“No public utility, or any officer or agent thereof, or any person acting for or employed by it, shall, directly or indirectly, by any device or means whatsoever, suffer or permit any corporation or person to obtain any service, commodity, or product at less than the rate or other charge then established and in force as shown by the schedules filed and in effect at the time. No person or corporation shall, directly or indirectly, by any device or means whatsoever, whether with or without the consent or connivance of a public utility or any of its officers, agents or employes, seek to obtain or obtain any service, commodity or product at less than the rate or other charge then established and in force therefor.

It is by the two sections above quoted that the elevated railroad companies are forbidden to issue passes or grant free transportation, but I think it is quite clear that neither of these sections apply to municipalities. It will be observed from section 38, above quoted, that the Public Utilities Act forbids any public utility to grant “any preference or advantage to any *corporation or person*,” and further forbids any public utility to subject “any *corporation or person* to any prejudice or disadvantage.”

Section 39 forbids any officer or agent of a public utility to furnish any service to "any *corporation or person*" at less than the scheduled rates, and further forbids any "*person or corporation*" to "seek to obtain or obtain any service" at less than the established rate. It will be observed that the discriminations, preferences and advantages above forbidden and prohibited are discriminations, preferences or advantages "to any *corporation or person*." What then is the meaning of "corporation" and what is the meaning of "person"? In section 10 of the Public Utilities Act, these terms are defined as follows:

"The term 'corporation,' when used in this Act, includes any corporation, company, association, joint stock company or association, *but not municipal corporations.*"

"The term 'person,' when used in this Act, includes an *individual, firm or co-partnership.*"

From these definitions it is clear (1st) that "municipal corporations" are excluded from the definition of "corporation," and (2d) that a municipal corporation cannot reasonably be comprehended in any of the terms "individual," "firm" or "co-partnership" contained in the definition of "person."

I am, therefore, of the opinion that sections 38 and 39 do not apply to, and that the State Public Utilities Commission so far as these sections are concerned has no jurisdiction over, any of the arrangements that may be entered into between the municipality of Chicago and the elevated railroad companies providing for carrying, at reduced rates, city officials and employes while on duty.

I suggest that this matter be taken up with Mr. Patten and the legal representatives of the elevated railroad companies to see whether, on further consideration, they may not be convinced that the above is the correct construction of the law.

Respectfully submitted,

JAS. G. SKINNER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 13, 1914.

HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

We are in receipt of your communication of the 7th inst. asking a series of questions in respect to the serving or sale of intoxicating liquors in Chinese restaurants or other restaurants having no dramshop license. We will answer the questions in the order in which they are propounded.

(1) Chinese (or other) restaurants cannot lawfully serve intoxicating liquors on their premises without a dramshop license where the liquor is secured from a saloon downstairs and conveyed up to the restaurant by a dummy. Such restaurants should be required to discontinue serving liquors or to procure a dramshop license.

(2) The rule stated in answer to question number one applies, irrespective of whether a profit is made on the liquors served or whether it is brought in to the restaurant as an accommodation and sold for the same price paid therefor by the restaurant-keeper.

(3) The proprietor of a saloon has no right to serve intoxicating liquors in a restaurant conducted by him upstairs over his place of business, or in a nearby building, without having a separate dramshop license therefor; nor can the saloon-keeper lawfully serve intoxicating liquor in a restaurant conducted by him in premises adjoining the bar-room unless such premises are directly connected, adjacent and contiguous with and to the bar-room and upon the same floor, and unless the license issued for the saloon or dramshop shall define with certainty and include the premises in which the restaurant is conducted.

(4) The rule stated in answer to the third question refers to cases where the restaurant is conducted by the saloon-keeper. Under no circumstances can intoxicating liquor be lawfully sold or served in a restaurant, under a dramshop license issued for premises adjacent to or adjoining the restaurant, where the restaurant is owned or conducted by some one other than the proprietor of the saloon.

The sections of the Chicago Code of 1911, governing the

matters above referred to are 1525, 1527, 1539 and 1540. Said Section 1527 is in part as follows:

"No license shall be issued for the keeping of any saloon, or dramshop, where more than one room is to be used, unless all the rooms which it is intended to use are directly connected, adjacent and contiguous with and to each other, and upon the same floor; and every license issued for a saloon or dramshop shall describe and define with certainty the room or rooms in which such saloon or dramshop is to be conducted or maintained. No person licensed to keep a saloon or dramshop shall be permitted to sell, give away or otherwise dispose of any intoxicating liquor of any kind whatsoever at any place other than the place specifically described in his license, whether such place be in the same building or not. * * *"

Yours respectfully,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 14, 1914.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

We have your several letters relative to a special deposit received from the Calumet Electric Street Railway Company and the South Chicago City Railway Company and the transferring of such deposits from the special fund to the corporate fund, also your inquiry as to whether these payments have been made in full of all demands against these companies up to March 31, 1908.

In order that you may fully understand the situation as it exists, we state the following:

The City of Chicago passed an ordinance granting the right to the Calumet Electric Street Railway Company to operate a street railway on certain streets in the southern portion of the City of Chicago. Mayor Swift, who was then in office, was of the opinion that the ordinance should contain a provision requiring the company to make certain compensation to the city for the privileges granted, and, therefore, de-

clined to sign the ordinance unless the company would enter into a contract with the city to make certain graduated annual payments to the city as compensation for the privileges granted by the terms of the ordinance. Whereupon, the company entered into such agreement with the city and the Mayor thereupon approved the ordinance, but when the time came for the payment of compensation under the terms of the contract above referred to, the Railway Company took the position that the Mayor was without authority to require it to enter into any such contract as a condition precedent to his approving the ordinance, and, therefore, declined to pay the compensation provided for in the contract. At that time the Street Railway Company was in the hands of a receiver appointed by the Circuit Court of the United States, and the city filed a petition in that proceeding for an order or decree directing the receiver to pay to the city the compensation provided for in the contract aforesaid. The receiver demurred to the petition, and upon argument being made on said demurrer before Judge Sanborn, the court overruled the demurrer and held that the company having received the benefits of the ordinance was estopped to question the authority of the Mayor to exact of it the contract in question. The decision in question will be found reported in *Potter v. Calumet Electric Street Railway Co.*, 158 Fed. 521.

Shortly thereafter, the Calumet Electric Street Railway Company and the South Chicago City Railway Company desired to consolidated, and applied to the city for an ordinance granting to the consolidated company a franchise which would be in lieu of that hereinbefore referred to and granted to Calumet Electric Street Railway Company, and as a part of the negotiations for such new franchise, the companies in question respectively tendered to the city their checks for \$13,000 and \$2,000; the former item being tendered in full payment of the liability of the Calumet Company under the contract hereinbefore referred to, and the South Chicago Company tendering the \$2,000 in full payment of all liability under its existing franchise ordinance. These checks were received with the understanding that if the consolidation ordinance was passed, which was in fact done, the question of

accepting the amounts tendered in full payment would be placed before the Council.

So far as our investigation discloses, although the consolidation ordinance was passed, the Council took no formal action approving the settlement offered by the companies.

We are, therefore, of the opinion that the Council should be called upon to approve or disapprove of the settlement, and if it approves thereof, direct the City Comptroller and Treasurer to transfer from the special deposit to the corporate fund the sums above referred to.

We are further of the opinion that it is to the best interest of the city that the settlement offered by these companies be accepted by the Council, particularly in view of the fact that the original companies are no longer in possession of any assets out of which a judgment could be collected even if it were recovered, and a recovery at this time is a question of considerable doubt.

Yours very truly,

CHARLES M. HAFT,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 16, 1914.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

We have your letter of January 13th, asking whether it would be legal to insert a clause in specifications for castings and other material, to read:

“In order to insure prompt delivery of material and inspection of material at minimum cost, preference will be given to contractors who have shops located in the City of Chicago.”

We have no hesitancy in answering this question in the affirmative.

You also ask whether, under such a clause, the Commissioner of Public Works can reject a low bid by a firm having limited facilities and located outside of the city, if he has

good reason to believe that the city's work would suffer by reason of delays in receiving material.

Answering your last question, we beg to advise you that under the law you are required to award a contract to the lowest responsible bidder therefor, and that in determining the question of a bidder's responsibility, you may take into consideration his ability to carry out the contract on which he has bid. And, in determining this question, you may exercise a limited discretion in determining whether or not a particular bidder is possessed of the requisite ability to perform the contract, if it should be awarded to him, in such a manner that the city's work would not suffer by reason of delays in receiving material to be furnished under the terms of the contract.

We are of the opinion, however, that you are not possessed of authority to reject a bid simply because the maker thereof, who is responsible and possessed of adequate facilities to perform the contract, has his shop located outside of the City of Chicago.

Yours very truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 16, 1914.

HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

In response to your verbal request for an opinion as to whether you have the right to allow a bidder to withdraw his bid before the same has been accepted will say, that it has been held—

“that a bidder has no right to withdraw his bid even before the bids are opened, nor have the municipal authorities the right to permit him to withdraw it.”

McQuillin on Mun. Corp., Sec. 1222, citing *Kimball v. Hewitt*, 2 N. Y. S. 697.

See also:

Wheaton Building Company v. Boston, 204 Mass. 218.

This department has, however, frequently held that a wide discretion is allowed to municipal officers in determining who is the lowest responsible bidder, and if in your judgment, exercising the same in good faith, you shall determine that the lowest responsible bidder, although financially responsible, is not a proper party to fulfill the contract, you may disregard his bid, and in the absence of fraud, collusion, etc., the courts will not interfere in the reasonable exercise of your discretion.

If, on the other hand, your advertisement states that you have the right to reject any and all bids, you are empowered so to do and may reject all bids and proceed anew with the letting of the contract. McQuillin on Mun. Corp., Sec. 1229, reads:

“Where discretion is conferred to reject ‘any and all bids,’ it is held that the courts will not interfere with the discretion unless exercised with a fraudulent intent, to the injury of the party complaining, and where the injury is to a vested right.”

We do not, therefore, feel safe in advising you arbitrarily to return a check to any bidder who may request the same unless you shall determine to reject all bids or unless you feel, in the exercise of your discretion, that the lowest responsible bidder would not satisfactorily fulfill his contract or that his merchandise is not of proper kind to warrant your giving him the contract, in which case you may accept the next highest bidder, and so on.

Yours very truly,

LOUIS SALINGER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 22, 1914.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

Yours of the 20th inst., with letter addressed to you by Ray Palmer, Commissioner of Gas and Electricity, were received.

It appears that the city entered into a contract with the Curtis-Ward Company for furnishing and erecting street signs. This contract provided for the completing of the work under its terms December 31, 1913. For failure to do so a penalty of \$5 a day as liquidated damages was exacted.

It further appears that the City Council passed an order (Journal of the City Council, 3317) authorizing the city electrician to extend the time for completion of the contract with Curtis-Ward Company for a period of 90 days from January 1, 1914.

The reason Curtis-Ward Company did not complete its contract was, that the city authorities requested the Curtis-Ward Company to suspend the work because the city council was further considering the changing of street names, and to complete the contract would entail greater costs to the city for additional signs caused by contemplated changing of street names.

In the case of the *Ludlow Valve Manufacturing Co. v. City of Chicago*, in the Appellate Court, the same clause for penalty as liquidated damages was passed upon by said court, also a council order passed after the terms of the contract had been completed as to time. In that case the city did not suffer any damages, nor did it contribute to the delay.

The court further held that said council order passed subsequent to the designated time for completion, was nugatory.

The facts concerning the Curtis-Ward Company contract differs from the Ludlow Valve Manufacturing Company's, because the completion was delayed at the special instance and request of the city, and the city contributing to the delay cannot exact the penalty as liquidated damages, as such request for delay constituted a waiver of the liquidated damage clause.

The city could without having contributed to the delay by an order of the city council within the time prior to December 31, 1913, extend the time of completion. As the request for delay constituted a waiver of the liquidated damage clause and was treated so by the city, the city had the right through its city council to express its waiver and extend the time of the performance of said contract, after the time limitation had expired.

In view of the facts herein expressed we are of the opinion that the council order passed January 5, 1914, is valid.

If it were held to be to the contrary, the city could not then exact the penalty provided in said contract as liquidated damages because it had waived the terms of the contract as to time of performance.

Very respectfully,

S. A. T. WATKINS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JANUARY 23, 1914.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have been directed by the corporation counsel to advise you with respect to the present status, legal and otherwise, of the applications for permits on the part of the Chicago Railways Company for repairs on manholes and tracks, which question was brought to your attention by a letter, dated December 9, 1913, from the Chairman of Board No. 1 of Supervising Engineers.

On December 8th, the chief engineer of the Chicago Railways Company complained to the chairman of the Board of Supervising Engineers that "the Chicago Railways Company has requested permits from the City of Chicago for *repairs on manholes and track*. These manholes are very dangerous and we so advised the City of Chicago, but the city would not issue the permits unless they were made out on a form which the city submitted to the company. Under the 1907 ordinance, the company contends that they cannot use this form of request for permit."

The question of law raised by the latter part of the above quotation will be first taken up by me.

Under Exhibit "B" to an ordinance to the Chicago Railways Company, passed February 11, 1907, it is provided, under the head "Permits" that—

"the company, before it makes any excavation in or in

any way interferes with the surface of any street or public way for the purpose of doing any work, shall obtain from the commissioner of public works of the city a permit so to do, which permit shall contain a condition requiring the company to restore said street or way and maintain it for one year thereafter. * * *

In regard to "Tracks," the same exhibit provides that—"the tracks to be maintained by the company shall not be elevated above the surface of the street or public way in which they are placed. They shall be laid and maintained by the company so as to conform to the grade of such street or public way as the same is, or from time to time hereafter shall be, established by the city council. All new tracks shall be laid with best materials and in the most approved and modern manner."

Under "Spacing Tracks" (same exhibit), we have the following:

"In laying or relaying in any of the streets included in the accompanying ordinance, upon which more than one track is located, the distance between centers of tracks may remain as at present. The exact location of tracks in the streets shall be subject to the approval of the commissioner of public works."

With respect to "Rails," the exhibit provides that—

"All new track construction hereafter laid in streets or public ways shall be laid with modern improved rails of the grooved type * * * which shall in all respects conform with the specifications for grooved rails as contained in section 1944 of the Revised Municipal Code of Chicago, as amended by ordinance of the city council passed April 8, 1906. * * *"

From the above provisions it is plain that the commissioner of public works is entrusted with a certain discretion in regard to the work of laying and repairing tracks, and the exhibit also calls for a permit as a prerequisite to making any excavation in or interfering with surface of any street. This permit must, among other things, contain a certain condition to restore the street and maintain it for a year, but that does not exclude the idea that the permit may not contain other reasonable conditions. Were there any doubt as to the retention by the city, by the very terms of the ordinance in question, of the right to retain control over the streets and work therein by the companies, the language in section 37 of this

ordinance would decide the doubt in favor of the city's contention. This section after expressly providing that—

“nothing in this ordinance contained shall be construed as depriving the said city of the right of exercising any police power which it would have possessed or enjoyed had this ordinance not been granted,”

goes on to provide that—

“the enumeration herein of special requirements and specific regulations shall not be taken or held to imply the relinquishment by the city of its power to make other requirements or regulations, and the said city hereby expressly reserves the right to make all regulations which may be necessary to secure in the most ample manner, the safety, welfare and accommodation of the public, including, among other things, the right to pass and enforce ordinances to protect the public from danger or inconvenience in the management and operation of street railways throughout the said city. * * *”

It thus appears that not only does the ordinance itself require work on the surface of the street to be subject to the permits from the department of public works, but there are express reservations of ample police power in the ordinance under which the company would be amenable to the general ordinance provisions contained in the city code with regard to permits.

I am of the opinion, therefore, that in the given case, the street railway company can be prohibited from doing any work on the surface of the streets, either with respect to repairs on manholes or track, unless and until it first secures a permit from the commissioner of public works, or some bureau acting under his general direction.

The views hereinabove expressed apply rather to a future situation than to the one presented by the correspondence before me, since I am informed by the street department that the applications for permits in question have, subsequently to the date of the correspondence above referred to, been applied for in due form by the Chicago Railways Company, and permits pursuant to such applications have been issued by the department. The present matter, therefore, is largely an abstract question, but in view of the possibility of similar sit-

uations arising in the future, I have thought best to explain at some length the legal phases of the question.

Yours respectfully,

JOHN W. BECKWITH,
First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 23, 1914.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

The question has been asked this department whether certain changes are legally permissible in an ordinance providing for the licensing and regulating of mason contractors, etc., passed January 16, 1914, so that contractors engaged in laying sewers may be excepted from the necessity of obtaining a mason's license provided for in the ordinance.

We have before us a communication from the engineer of the board of local improvements wherein he calls attention to the fact that if contractors in the business of building sewers are compelled to secure a mason contractor's license very few of such contractors will be competent for such a license, not being masons by trade, and having no technical knowledge requisite to pass the examination by ordinance required, and consequently competition in the sewer laying business will be eliminated and the cost of the work thereby increased. The ordinance in question was prepared in this department by Assistant Corporation Counsel Hornstein, who informs me that in the deliberations of the committee on finance the point was distinctly brought to the notice of the committee that the present language of the ordinance would exclude from sewer work all except licensed mason contractors, and with this knowledge at hand the committee, notwithstanding the effect of such exclusion, recommended the ordinance for passage by the city council. I mention this to show that the point raised by the engineer of the board of local improvements is not a new one and has been fully discussed during the framing of the ordinance by the committee having the same in

chargé. With a full knowledge on the part of the committee that the language used would have exactly the effect which the engineer of the board of local improvements is now animadverting upon.

Admitting, however, that the criticisms of the ordinance are well founded, I neither agree with the statement of the engineer of the board of local improvements in his communication that "it is my opinion that the statute did not contemplate the licensing of contractors who were engaged in the business of building sewers," nor will the statute in question permit of any such exception as is suggested in his communication, namely, exempting sewer contractors from the necessity of passing an examination and obtaining a license.

An act to provide for the licensing of mason contractors and employing masons and to regulate the safe and proper construction of buildings, approved June 30, 1913, Session Laws of 1913 (page 356), provides:

"SECTION 1. That in all cities of this State of 150,000 inhabitants or over, every mason contractor or employing mason shall be required to obtain an annual license therefor, in the manner following:

§ 2. Every person desiring to engage in the business of mason contractor or employing mason shall make application to a board of examiners. * * *

This provision obviously includes every mason contractor or employing mason irrespective of whether his work is mason contracting with respect to sewers or with respect to above ground structures. This being so, it would be incompetent for the city council to make an exception eliminating sewer mason contractors from the ordinance when the organic act provides that *all* mason contractors shall be subject to its provisions.

The misapprehension of the engineer of the board of local improvements with respect to construction of the statute in question arises from what we believe to be an incorrect interpretation of section 5 of the act. This section prescribes, so far as is material to be quoted, that:

"Each city shall, by ordinance or by law, within three months of the passage of this Act, prescribe rules and regulations for the materials, construction, alteration

and inspection of all mason work placed in or upon or in connection with *any building in said city*; and the building department shall provide that no mason work shall be done upon *any building* without a permit being first issued therefor. * * * (The italics are ours.)

The effect of the above provision is that every city shall pass building ordinances concerning mason work on "any building in the city." Conceding, *pro hac vice*, that "buildings" (as used in the statute) means a structure for human habitation, such a construction would in no wise destroy or alter the effect of section one of the act which provides that every mason contractor or employing mason shall obtain a license. The two requirements are separable and distinct; the one imposes an obligation upon every person desiring to engage in the business of mason contractor or employing mason, the other upon cities to pass appropriate building laws with respect to mason construction. It cannot be said that even construing the term "building" in the manner in which the engineer of the board of local improvements has done that such a construction shows the plain intent, or any intent, on the part of the framers of the act to exclude from the necessity of obtaining licenses all those except mason contractors engaged in or upon building work, using buildings in the sense contended for by the engineer.

I am of the opinion that a view which would be quite as readily sustained is one which would construe the word "building" to mean any structure in which masonry was employed, for there seems no reason for prescribing conditions to obtain proficiency and competency on the part of masons only regarding above ground buildings for human habitation and removing such safeguards concerning contractors doing underground work. The object of the law undoubtedly was to secure a degree of competency in workmen upon mason jobs to increase public safety. The public safety, it may be apprehended, is as much concerned with underground masonry work as it is with such work above ground and we can see no reason why the legislature should not have required the same safeguards as to those practicing this vocation on work beneath the surface as above the surface, and as before stated,

the language of the first section warrants us in entertaining such a view.

I am, therefore, of the opinion that there is not only no warrant for concluding that the legislature intended to confine the obligations of the act to only those masons engaged on above ground construction, but likewise conclude that the language of the act prohibits any exception or exemption on the part of the local legislative authority.

Yours respectfully,

JOHN W. BECKWITH,
First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 28, 1914.

HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

Your letter of the 2d inst., accompanied by letter from Alderman Holding and one from Walter F. Heinemann of the Ridge Park District, has been referred to me. Commissioner Heinemann's letter is somewhat uncertain. He says in the letter:

"Under the laws as we are organized as a park district we have no police power outside of the park itself. We think it is not only advisable, but necessary for us to have jurisdiction to be able to make arrests and take offenders * * * to the Municipal Court."

He then asks if the City of Chicago can furnish them regular or special policemen to protect persons at a field house and with general power and jurisdiction throughout the City of Chicago.

I am informed the Ridge Park District is organized under "An Act to provide for the organization of park districts and the transfer of submerged lands to those bordering on navigable bodies of water," approved June 24, 1895. Section 1 of said Act authorizes the organization of certain territory into "a park district for the establishment, construction and maintenance of public parks and boulevards."

Section 11 of said Act, as amended by Act approved April 22, 1899, provides, substantially, as follows:

“The commissioners elected in any such park district shall be the corporate authorities thereof and shall have power to pass all necessary ordinances, rules and regulations; they shall have full power to manage all the officers and property of said district, and all parks, boulevards and driveways maintained by such park district, or committed to its care and custody. They may by ordinance regulate and restrain the use by the public or by individuals of any and all parks, boulevards and driveways * * * and may prescribe fines, etc., for violation of such ordinances; the fines shall be collected in the name of the park district and shall be paid into the treasury of such park district. They are authorized to employ a ‘police force as may be required’ and may define and describe their respective duties and compensation.”

Said Section 11 further provides:

“The park commissioners and all police officers appointed by them shall be conservators of the peace within and upon such parks, boulevards, driveways and property controlled by such park district, and shall have power to make arrests on view of the offense, or upon warrants for violation of any of the penal ordinances of such park district or for any breach of the peace, in the same manner as the police in such cities.”

By Section 20, said district is empowered to levy and collect taxes upon the property in the district for the necessary expenses of said district, etc.

From the foregoing and other sections of the Act, under which said park district is organized, it clearly appears that said park commissioners have ample authority and it is their duty to appoint a police force as may be necessary to properly police the parks, boulevards, driveways, and all property controlled by such district and to prescribe their respective duties and compensation, and are further authorized to levy and collect taxes to pay for same.

If the field house referred to in the Commissioner's letter is property under the control of said park commissioners they have ample authority for appointing and paying all necessary police officers to protect the same and all persons visiting therein.

Aside from the authority to levy and collect taxes, it does not appear, however; that said park commissioners have any jurisdiction within the park district outside of the parks, boulevards, and other property actually under control of said commissioners. As to other streets and land within said park district, the City of Chicago has full and absolute jurisdiction for police purposes unless such control has been expressly given or taken away from the City.

The following is held in the case of *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392 (406):

"It is a well recognized principle of law that there can not be at the same time, within the same territory, two distinct municipal corporations exercising the same powers, jurisdiction and privileges."

Therefore, it appears that the City of Chicago can not furnish regular or special policemen to act generally for the park commissioners within their jurisdiction. Nor can jurisdiction be conferred by the City upon the park commissioners simply to police the City's streets. Each has its rights and ample power and duties within its respective jurisdiction. And neither has the right to exercise such authority within the territory of the other.

My conclusion, therefore, is that it is the duty of the park commissioners to employ and pay from its own treasury all policemen necessary to take care of all parks, boulevards, buildings and other property actually within their control, and that as to all other streets and property (even though lying within the boundaries of the park district), said commissioners have no jurisdiction and no authority to concern themselves about police matters. The question of policing the latter streets and property by either regular or special policemen is a matter wholly within the hands of the General Superintendent of Police of the City of Chicago (provided, of course, such streets and property are under the jurisdiction of the city).

We have received an additional communication, dated December 16, 1913, from H. F. Schuettler, First Deputy Superintendent of Police, transmitting therewith an unsigned communication, upon the letterhead of the Ridge Park Dis-

trict, requesting the appointment by the General Superintendent of Police of the City of Chicago "of one Mr. Wilcox to be a special policeman in the Ridge Park." In answer to these last mentioned letters, we submit:

For the reasons hereinbefore shown, the General Superintendent of Police of Chicago has no authority to appoint a special policeman in the Ridge Park, as requested.

The only special policemen authorized by the Chicago ordinances are those mentioned in sections 1919, 1920 and 1921 of the Chicago Code of 1911. Section 1919 authorizes special patrolmen to be appointed during "times of peril, danger, riot or pestilence, or apprehension thereof, * * * or during any public election or celebration." Section 1920 authorizes the appointment of persons "in the employment of the City, as special policemen." Section 1921 authorizes the appointment of special policemen "to do duty at any fixed place within the city."

All of the foregoing special policemen are subject to all the rules and regulations governing the police force of the City and are under the management and control of the General Superintendent thereof; and, section 1922 provides that they shall have the powers, privileges and duties of the regular police patrolmen.

Section 1921 would come the closest to meeting the case presented; but it must be apparent from all the foregoing that our City Council not only did not have the power but also that it was not its intention to attempt to authorize the appointment of police officers for and to act within the jurisdiction of another municipal corporation having within itself full power of appointment.

Respectfully submitted,

WILLIAM J. NAUGHTON,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 28, 1914.

TO THE HONORABLE, THE MAYOR AND THE CITY COUNCIL OF THE
CITY OF CHICAGO.

Gentlemen :

We desire to submit for your consideration our opinion and suggestions relative to the so-called "Workmen's Compensation Law" and its effect in cases where city employes are accidentally killed or injured while in the course of their employment.

The original act entitled "An Act to promote the general welfare of the people of this State, by providing compensation for accidental injuries or death suffered in the course of employment," was approved June 10, 1911, and went into effect May 1, 1912. (Hurd's Rev. Statutes 1913, p. 1136.)

Certain designated classes of employers were eligible to come under its provisions, but it was optional with them whether or not they would operate under it.

The Act being generally conceded to be unconstitutional, or at least defective, and there being grave doubt as to whether the City of Chicago was eligible to come within its provisions, your honorable body on April 22, 1912, exercised said option by directing the City Clerk to serve notice on the State Bureau of Labor Statistics that the City of Chicago had elected not to be subject to the provisions of the Act. (See Council Journal 1911 and 1912, p. 3483.) This action was taken in accordance with the recommendation of this department expressed in its opinion of January 3, 1912, to the Commissioner of Public Works.

At the last session of the General Assembly said Act was repealed, and a new Act, with practically the same title, was passed, approved June 28, 1913, and went into effect July 1, 1913. (1913 Session Laws, p. 337.)

This Act creates the "Industrial Board of Illinois," consisting of three members appointed by the Governor with jurisdiction over the administration of the Act. The Board was not appointed and organized until September 1, 1913, and it is questionable whether it has jurisdiction over claims accruing prior to that date.

This Act also gives the City an option as to whether or

not it will operate under it, and while its validity will also probably be attacked, yet it is generally conceded to be more comprehensive and effective than the earlier Act.

For that and other reasons hereinafter stated it was deemed advisable that the City of Chicago should operate under the Act, and having failed to reject it within the time prescribed, the city has been subject to its provisions since July 1, 1913, and must operate under it for the current year (1914). If, however, after observing its operation, it hereafter is deemed advisable by your honorable body not to operate under the Act after this year, notice to that effect must be filed with the "Industrial Board" on or before November 1, 1914.

The probable effect of the Act in cases where city employes are killed or injured in the course of their employment, will be to change the law relating to the city's liability and the measure of damage.

Under the old system there were two ways of dealing with this class of cases. If there was a serious injury and apparent liability on the part of the city the injured employe entered suit and if successful recovered a judgment for such sum as the jury awarded, but if unsuccessful received nothing.

In a case where there was no apparent liability on the part of the city, the injured employe usually presented a petition to your honorable body and after due consideration was usually allowed full wages for the actual time lost, together with his expenses for medical attendance. Under the Act, no matter how serious the injury or how great the city's negligence, the employe has no right of action in a court of law for his damages but must proceed under the Act and accept the compensation awarded by or with the approval of the Industrial Board.

The Act prescribes a designated amount to be paid for certain injuries or disfigurements, such as the loss of a hand, a foot, an eye, etc., and in addition thereto provides that the injured employe shall receive, during a designated period of time that he is totally incapacitated for work, a sum equal to one-half the wages he was receiving at the time he was injured.

It also provides that in case of partial incapacity to pur-

sue his usual line of employment the employe shall, subject to certain limitations, receive a sum equal to one-half of the difference between the wages he received before the accident and the amount which he is able to earn in some suitable employment or business after the accident.

Under a strict construction of the Act it would seem that the injured employe would not be entitled to compensation in case of partial incapacity as above mentioned, but the Act has been liberally construed by the Industrial Board, and thus far the question has not been raised.

All claims arising under the Act may be settled by agreement of the parties. If they fail to reach an agreement an arbitration committee shall be appointed under the direction of the Industrial Board. The decisions and awards of the Arbitration Committee shall be entered of record as the decisions of the Board, but shall within certain limitations be subject to review or revision by the Industrial Board, and if the facts and circumstances warrant it compensation payments may be re-established, increased, diminished or ended.

When questions of law are involved the decisions of the Board may be reviewed by the Supreme Court. Where no proceeding for review or revision is had either party may present a certified copy of the decision of the Board to the Circuit Court of the County in which the accident occurred and a judgment will be entered in accordance therewith.

The Act provides that, with certain exceptions, all compensation must be paid in installments at the same intervals at which the wages of the employe were paid at the time of the injury.

Some of the reasons why it is to the City's advantage to operate under the Act are:

When an employer elects not to operate under the Act and suit is entered against him by an injured employe, the employer is not allowed to avail himself of the three common law defenses heretofore available, to wit: the doctrines of "assumed risk," "fellow servant" and "contributory negligence."

In many cases where a servant sues his master for injuries received in the course of his employment, the injuries

are caused by reason of the ordinary risks of the employment, the negligence of a fellow servant, or the contributory negligence of the injured man himself. Deprived of these defenses the city will be held liable and mulcted in damages in cases which otherwise could be successfully defended.

Although these defenses could have been availed of, the city, in the past, has allowed the injured employe his full wages during incapacity together with his reasonable medical expenses.

Claims such as were heretofore settled on the basis of full wages for loss of time and medical expenses under this Act can be adjusted on the basis of one-half wages and medical attendance furnished by the City.

The first case in which the City of Chicago has been notified by the Industrial Board to defend a claim under the new compensation Act can be used as an illustration of the practical working of the Act. An employe of the water pipe extension department was injured by the caving in of the banks of a trench in which he was working, the trench not being shored or braced; he was totally incapacitated for work for a period of 39 days; his wages were \$2.75 a day; his expense for medical attendance was \$22; there was apparently a clear liability on the part of the City; under the old system in a suit at law he might recover damages for medical expenses, actual time lost, pain and suffering and all damage which in the opinion of the jury he would in the future sustain as the result of said injuries.

If, instead of entering suit for damages, he filed a petition with your honorable body he would probably be awarded 39 days' wages at \$2.75 a day, or \$97.25, together with his medical expenses, \$22, making a total of \$119.25.

Under the Compensation Act the first seven days of incapacity for work are deducted so that he will probably be awarded one-half his wages for 32 days at \$1.37½ a day, or \$44, plus his medical expenses of \$22, making a total of \$66, or \$53.25 less than he would have received under a council petition.

Attention is also called to the fact that where a city employe is killed or injured while in the course of his employ-

ment by the negligence of a third party whom is also under the Act, the city must compensate the employe or his heirs, etc., under the terms of the Act but may have recourse for the money so paid in the nature of an "Action-Over" against said third party.

Section 31 of the Act relating to independent contractors is of vital importance to the City. Notwithstanding section 5 of the Act specifically provides that "one employed by a contractor who has contracted with the * * * City * * *" shall not be considered as an employe of the City * * *," yet section 31 makes the City liable to pay compensation in cases where the work is being performed under contract as aforesaid, unless the City shall have required the contractor to insure his liability to pay the compensation provided in the Act. That is to say, if the City fails to require the contractor so to insure his liability, then the City and the contractor are jointly and severally liable to pay the compensation.

We therefore recommend that a clause be inserted in all city contracts for public improvements requiring the contractor to insure his liability to pay compensation to his workmen who may be accidentally injured or killed in the course of the employment.

The Act applies to every person in the service of the City except "officials" and employes for whose accidental injury or death arising out of and in the course of his employment compensation or a pension shall be payable to him, his heirs, etc., from any pension fund to which the City contributes in whole or in part.

As the City is operating under the Act it would not only be illegal but unwise for it to wait until the injured man should report back for work before investigating and considering his claim for compensation under the law, because it would be possible for him to compel compensation for total incapacity extending over several weeks or months, while in fact he might have been only partially incapacitated or if totally incapacitated only for a much shorter period than he claimed.

The Act requires the City to report to the Industrial

Board immediately all accidents in which death occurs and to report twice each month all accidental injuries for which compensation has been paid under the Act, together with the date, time, name and address of the injured man, the nature of the injuries, the amount paid from time to time, etc.

We respectfully recommend that your honorable body designate the procedure to be followed by the City in complying with the Workmen's Compensation Act.

It might be advisable to create a bureau to be known as the Bureau of Workmen's Compensation to have charge of the matter for the City.

Until a definite policy is decided upon we recommend that all claims for compensation under the Act accruing since July 1, 1913, and undisposed of be settled in accordance with the compensation Act upon investigation and opinion rendered by the law department.

Respectfully submitted,

JAMES J. O'TOOLE,
Assistant City Attorney.

Approved:

N. L. PIOTROWSKI,
City Attorney.

WM. H. SEXTON,
Corporation Counsel.

JANUARY 28, 1914.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

We are in receipt of your communication of the 16th instant, requesting an opinion on the following questions:

1. What registration shall be taken as the basis upon which to compute the number of signatures required upon petitions now being circulated for the submission of the subway questions at the election to be held April 7, 1914?
2. Can women qualified to vote sign the petition prior to February 3, 1914, which is the next day of registration?

At a meeting of the board of election commissioners held yesterday, a resolution was adopted by the board which is as follows:

“WHEREAS, Frequent inquiries are being made of this Board concerning the registration basis of signatures to petitions under the Public Policy Act; and, also as to the right of persons who may register on February 3d, prox, to sign such petitions; also whether it be permissible to have such petitions presented to electors at the polling places on February 3d, prox; and,

“WHEREAS, It seems necessary that this Board now take action upon said questions; therefore be it

“RESOLVED, That the registration for the municipal election of the City of Chicago as revised on March 15, 1913, shall be taken as the basis upon which to compute the number of signatures required upon the petitions submitting questions under said Public Policy Act for the election of April 7, 1914.

“RESOLVED, That this Board holds that all persons who are lawfully registered on February 3d, next, are qualified to sign said Public Policy petitions.

“RESOLVED, That this Board rules and directs that all election judges and clerks who are under the jurisdiction of the Board shall permit the circulation of said petitions at the several polling places of Chicago on the day of registration, February 3d, prox, but in such a manner as will in no wise interfere with such registration.”

We are of the opinion that the above quoted resolution lays down the correct rules upon the questions covered therein, and that—

1. The registration as revised on March 15, 1913, should be taken as the basis upon which to compute the number of signatures required upon the petitions above referred to.

2. Women who are now registered (having registered for the purpose of evidencing their right to vote for university trustees) may sign the subway petitions now or at any time before the petitions are filed.

3. That persons, men and women, who are now unregistered but who register lawfully February 3d, may sign the subway petitions at any time after (but not before) they become registered, and before the petitions are filed.

Yours truly,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JANUARY 30, 1914.

TO THE HONORABLE, THE CITY COUNCIL, OF THE CITY OF CHICAGO.

Gentlemen:

On January 26, 1914, your honorable body passed an order which was as follows:

"ORDERED, That the Corporation Counsel be and he is hereby directed to submit an opinion to this Council at its next regular meeting as to whether it would be legal for the voters at the Aldermanic Primary election to be held February 5, 1914, to sign petitions in the various polling places within the City of Chicago for the submission to the voters of the City of Chicago the questions of the Initial and Comprehensive Subways."

The order refers to the "Aldermanic Primary election to be held February 5, 1914." We presume that it was intended that the order should refer to February 3d, the day of registration for the primary for the nomination of alderman in Chicago, to be held February 24th.

We are of the opinion that the signing in the polling places of petitions for the submission of the questions referred to in the order would not be unlawful, but would be a matter within the discretion and control of the board of election commissioners.

On January 27, 1914, the board of election commissioners adopted a resolution ruling and directing that all election judges and clerks who are now under the jurisdiction of the board should permit the circulation of the said petitions at the several polling places of Chicago on the day of registration, February 3, 1914, but in such a manner as will in nowise interfere with such registration.

It follows that the petitions referred to in the council order can lawfully be circulated and signed at the polling places of Chicago on the day of registration, February 3, 1914, provided the same are circulated and signed in such manner as will in nowise interfere with the registration.

Respectfully,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 4, 1914.

TO THE HONORABLE, THE CITY COUNCIL, OF THE CITY OF CHICAGO.

Gentlemen:

On January 12, 1914, your honorable body directed this department to submit an opinion regarding the legal status of property owners abutting upon the Chicago River and its branches, in the event that the City of Chicago be permitted by the Secretary of War to construct permanent bridges over the same. (Council Journal, page 3404.)

The charter power of the city to construct bridges by and with the approval of the Secretary of War being conceded, the only question that remains to be answered is, whether in the exercise of this power the city would become liable in damages to property owners along the river in case it should provide for permanent bridges.

It is true that in this state property abutting the banks of a navigable river extends to the center thread of the stream and may be used and enjoyed by the owner in every legal manner, and cannot be taken or damaged for public use without making compensation therefor. This use is nevertheless subject to the public right of navigation and to such regulations as the public authorities may provide regarding the same.

Ensminger v. The People ex rel., etc., 47 Ill. 384.

City of Chicago v. Laflin, 49 Ill. 172.

Chi. & Pac. R. R. Co. v. Stein et al., 75 Ill. 41.

Yates v. Milwaukee, 77 U. S. 497.

Railway Co. v. Renswick, 102 U. S. 180.

Beidler v. Sanitary District, 211 Ill. 628.

Ballance v. Peoria, 180 Ill. 29.

This rule, however, does not apply in case the City of Chicago in the exercise of its charter power and by and with the approval of the Secretary of War, should provide for permanent bridges.

Bridges are but the continuation of streets or highways over water and where constructed under proper authority they cannot be said to be obstructions to navigation that may

be abated at the instance of a property owner nor does their construction entitle him to compensation or damages.

City of Chicago v. McGinn, 51 Ill. 266.

Miss. River Bridge v. Lonergan, 91 Ill. 508.

Ill. R. Packet Co. v. Peoria Bridge Assn., 38 Ill. 469.

State of Penn. v. Wheeling & Belmont Bridge, 59 U. S. 42, 432.

Transportation Co. v. Chicago, 99 U. S. 642.

Escanaba Co. v. Chicago, 107 U. S. 678.

Cardwell v. Bridge Company, 113 U. S. 205.

Willamette Iron Bridge Co. v. Hatch, 125 U. S. 11.

Lake Shore & Mich. Ry. v. Ohio, 165 U. S. 366.

Gibson v. United States, 166 U. S. 269.

U. S. v. Chandler, Dunbar Water Power Co., 229 U. S. 53.

Lewis Blue Point, etc., Co. v. Briggs, 229 U. S. 82.

North Shore, etc., Co. v. Nicomen Boom Co., 212 U. S. 406.

Jackson v. U. S., 230 U. S. 1.

Hughes v. U. S., 230 U. S. 24.

C. B. & Q. Ry. Co. v. People, 212 Ill. 116.

West Chic. G. R. Co. v. People, 214 Ill. 9.

People v. Economy Power Co., 241 Ill. 290.

Cummings v. Chicago, 188 U. S. 410.

In the *Wheeling Bridge* case, *supra*, the State of Virginia had granted the bridge company authority to construct a bridge over the Ohio River, which was claimed to be an obstruction to navigation. After a decree had been entered adverse to the company, Congress had passed a law by which the bridge was made a post road for the passage of the mails of the United States, and the company was authorized to maintain it at its present site and elevation, and requiring all persons navigating the river to regulate such navigation so as not to interfere with it. Here the court say, page 432:

“A class of cases that have frequently occurred in the State courts contain principles analogous to these involved in the present case. The purely internal streams of a State which are navigable belong to the riparian owners to the thread of the stream, and, as such, they have a right to use the waters and bed beneath, for their own

private emolument, subject only to the public right of navigation. They may construct wharves, or dams or canals for the purpose of subjecting the stream to the various uses to which it may be applied, subject to this public easement. But if these structures materially interfere with the public right, the obstruction may be removed or abated as a public nuisance.

"In respect to these purely internal streams of a State, the public right of navigation is exclusively under the control and regulation of the state legislature; and in cases where these erections or obstructions to the navigation are constructed under a law of the State, or sanctioned by legislative authority, they are neither a public nuisance subject to abatement nor is the individual who may have sustained special damage from their interference with the public use entitled to any remedy for his loss. So far as the public use of the stream is concerned, the legislature having the power to control and regulate it, the statute authorizing the structure, though it may be a real impediment to the navigation, makes it lawful."

And in *Transportation Co. v. Chicago*, *supra*, the court say on page 642:

"Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him a right of action. This is supported by an immense weight of authority."

And in *Cardwell v. Bridge Company*, the court, quoting from *Gilman v. Philadelphia*, 3 Wall. 713, say on page 209:

"The court observed that it was not to be forgotten that bridges which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters; that the commerce which passed over a bridge might be much greater than would be transported on the water obstructed; and that it was for the municipal power to weigh the considerations that applied to the subject, and to decide which should be preferred, and how far either should be made subservient to the other."

And in *Willamette Iron Bridge Co. v. Hatch*, *supra*, the court, quoting from *Hamilton v. Vicksburg, etc., R. R. Co.*, 119 U. S. 280, say on page 11:

“Until Congress intervenes in such cases, and exercises its authority, the power of the State is plenary. When the State provides for the form and character of the structure, its directions will control, except as against the action of Congress, whether the bridge be with or without draws, and irrespective of its effect upon navigation.”

And in *C. B. & Q. Ry. Co. v. People, supra*, the court say at page 116:

“* * * ‘The police power is to be clearly distinguished from the right of eminent domain; and the distinction lies in this: that in the exercise of the latter right private property is taken for public use, and the owner is invariably entitled to compensation therefor, while the police power is usually exerted merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, it is not taken for public use, but rather destroyed in order to promote the general welfare of the public, and in neither case is the owner entitled to any compensation for any injury which he may sustain in consequence thereof, for the law considers that either the injury is *damnum absque injuria* or the owner is sufficiently compensated by sharing in the general benefits resulting from the exercise of the police power.’
* * *”

By the River and Harbor Act of Congress, approved September 19, 1890, and the Act of March 3, 1899, the federal government has assumed jurisdiction over navigable waters of the United States. It was therefore held in *Cummings v. Chicago, supra*, that under existing legislation the City of Chicago as an agency of the State, has concurrent jurisdiction in the premises with the National Government.

I am therefore of the opinion that the city having full power to construct and maintain permanent or stationary bridges over the Chicago River, by and with the approval of the federal government, a property owner along the river is not entitled to compensation or damages on account of the impaired use of his property by reason of such permanent bridges.

Respectfully submitted,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 4, 1914.

HON. RAY PALMER, Commissioner of Gas and Electricity.

Dear Sir:

In your communication of January 30th you request an opinion in regard to

1. Whether the Hoefer system fulfills the legal requirements of the Chicago Telephone Company's ordinance in the matter of providing nickel first subscribers with a means of securing the attention of the operator without the deposit of a nickel.

2. Whether the Hoefer system fulfills the requirements of said ordinance for nickel last service.

3. Whether upon changing the nickel last subscriber over to the Hoefer system the company is compelled to change his rate to the nickel first rate without the taking of action by the subscriber.

The operating features of the Hoefer system are described in your communication as follows:

"By the Hoefer system a subscriber to Nickel Service desiring to make a telephone call removes his receiver from the switch hook. This operation places him directly in communication with the operator at the Central Office, who inquires what number he desires. The subscriber states the number desired, and the number is repeated by the operator for the purpose of confirmation. The operator then proceeds to secure the number desired. The subscriber immediately after giving his number is supposed to drop a nickel in his telephone. This nickel completes the electrical connections in such a manner that a signal is given to the operator signifying to her that the nickel has been dropped, and also completes the connections so that the calling subscriber's circuit is closed, and he is enabled to hear the operator ring his party, to get the busy signal, and to talk with the party called. Failure to drop his nickel results in his inability to hear the operator ring the party, to get the busy signal or to talk with the party desired. After setting up the connection the operator takes note of whether the called subscriber has dropped his nickel or not, the same being indicated to her by the lamp before mentioned. In case the subscriber has not dropped his nickel, the operator states: 'I do not get the signal for your nickel,' and if the subscriber still does not drop his nickel, the operator states,

'I still do not get the signal for your nickel.' A failure at this time on the part of the subscriber to drop his nickel results in his being switched to a supervisor who goes into the matter with him. When the subscriber drops his nickel, the nickel remains in suspense, that is, conditions are such that it may be returned to the calling subscriber or deposited in the cash box at the will of the operator at the exchange, and the operator is supposed to return the nickel to the subscriber in case the connection is not satisfactorily completed. In order to attract the operator's attention, the subscriber is supposed to move the switch hook up and down as in any other kind of telephone service. In the case of emergency calls, the operator is able to complete the connection in case the subscriber does not have a nickel or token to drop in the box, by means of a special switching arrangement placed at her disposal for use only in cases of emergency.

The essential features of the Hoefer service are, first, that the calling subscriber is able to get in touch with the operator before he drops his nickel, and, second, that the calling subscriber is not able to hear the operator ring, to get the busy signal, or to talk with the called subscriber until he has dropped his nickel."

In sub-division (d) of section 2 of the ordinance passed by the City Council May 26, 1913, fixing the maximum rates for telephone service in the City of Chicago which may be charged for a period of five years from and after the passage of said ordinance and its acceptance by the company, nickel first service is described as follows:

"Nickel first service, where the nickel must be deposited to call the operator, shall be furnished by said Chicago Telephone Company by means of telephone instruments equipped with a coin box and slot or similar device for receiving five cent pieces. * * *"

Said sub-division (d) also provides that the company shall install with each nickel first telephone located in a residence a push button or other device which will enable the subscriber, in an emergency, to call the operator without the depositing of a nickel.

In sub-division (e) of Section 2 of said ordinance, nickel last service is described as follows:

"Nickel last service, where the nickel must be deposited in the coin box, slot or similar device for receiving five-cent pieces immediately upon the request of the

operator, shall be furnished by said Chicago Telephone Company by means of telephone instruments equipped with a coin box and slot or similar device for receiving five-cent pieces. * * *"

The maximum rates prescribed in said ordinance for said two classes of service are the same, except that in the case of nickel first service the charge for additional messages in excess of the guaranteed number per day is four cents, which is one cent per message less than the amount charged for the guaranteed number of messages per day; whereas in the case of nickel last service there is no provision for any deduction in the charge for additional messages in excess of the guaranteed number per day.

Said sub-division (e) of section 2 also provides that subscribers to nickel last service shall be entitled to nickel first rates within thirty days after signing an application to the company for change in service to nickel first service.

Section 5 of "An ordinance authorizing the Chicago Telephone Company to construct, maintain and operate a line of telephone wires in the City of Chicago," passed November 6, 1907, to which the aforesaid ordinance passed May 26, 1913, is supplementary, provides that the company shall without extra charge at all times maintain its plant, system, wires, cables, electrical conductors and other equipment and service at the highest practicable efficiency and to that end shall adopt and put into use within the City of Chicago all available improved apparatus, appliances, equipment and methods of service developed in the process of the art of telephony, which shall have come into common use from time to time, or if experience has shown them to be practicable, and that said company shall so operate its plant, system and other equipment as to give its subscribers the best service possible under then existing conditions of the art of telephony.

The ordinance provision last referred to makes it the duty as well as the privilege of the company to afford its subscribers to any class of service the benefit of any available improved apparatus, appliance, equipment or methods of service developed in the process of the art of telephony, which

have come into common use from time to time or if experience has shown them to be practicable.

If the Hoefer system will afford subscribers an improved service in the nickel first service or the nickel last service described in the above quoted provision of the ordinance of May 26, 1913, without taking away or diminishing any of the advantages enjoyed by the subscribers to said classes of service, then, in our opinion, the company would be within its ordinance rights in insisting upon the installation of the Hoefer service.

1. *Re Nickel First Service:*

The essential features of the present nickel first service are that the subscriber can call the operator upon depositing a nickel and is enabled, in an emergency, to call the operator without the depositing of a nickel. The Hoefer system as described by you enables the subscriber not only in an emergency, but in all cases, to call the operator without depositing a nickel and, in case of emergency calls, the operator is able to complete the connection without the subscriber dropping a nickel in the box. The provision of the Hoefer system for the return to the subscriber of his nickel in case the connection is not satisfactorily completed seems to be as adequate as under the present system. The only substantial difference, from the subscriber's standpoint, that we observe between the operation of the Hoefer system and the present system is, that under the present system the subscriber cannot, except by the use of the emergency signal device, call the operator without first depositing a nickel, whereas under the Hoefer system the subscriber can at all times and in all cases, and without the use of the emergency signal, call the operator without depositing a nickel.

The ordinance entitles the subscriber to a device for calling the operator in an emergency without depositing a nickel. The Hoefer system enables the subscriber to call the operator at all times without first depositing a nickel.

We are of the opinion that if the Hoefer system is satisfactory in practical operation it would fulfill the requirement of the ordinance in respect to providing nickel first subscrib-

ers with a means of securing the attention of the operator without first depositing a nickel.

2. *In re Nickel Last Service:*

. One of the distinguishing features of the nickel last service is that the nickel must be deposited in the coin box by the subscriber "immediately upon request of the operator." The ordinance contemplates that the subscriber to this class of service shall not be required to deposit a nickel until requested to do so by the operator. The Hoefer system as described by you contemplates that the subscriber immediately after giving the number desired will deposit his nickel *without* being requested to do so by the operator.

The subscriber's right to defer the depositing of a nickel until requested so to do by the operator may fairly be considered as a privilege to which the subscriber is entitled under the ordinance provision in respect to nickel last service. The ordinance requires the company to furnish this class of service when desired and the privilege mentioned cannot, against the subscriber's wishes, lawfully be taken away from him by the installation of a different system.

We understand that under the Hoefer system the dropping of a nickel by the subscriber without request of the operator is merely a general operating regulation and if not complied with by the subscriber that there is no mechanical or other obstruction to the operator requesting the subscriber to drop a nickel as is done under the present system. If under the Hoefer system the subscriber does not drop his nickel immediately after giving the number desired and thereupon the operator requests the subscriber to drop a nickel, then the provision of the ordinance in respect to the subscriber in regard to nickel last service not being required to drop the nickel until requested so to do by the operator, would be fulfilled.

3. *In re Charge for Service:*

We are of the opinion that the nickel first rate would, without action by the subscriber, apply to all nickel 'phone subscribers using the Hoefer system, except such nickel last subscribers as may habitually refuse to drop a nickel until

requested so to do by the operator, and that the nickel last rates would apply to such last mentioned subscribers.

The company, however, should be required to enter into an agreement to the above effect with each nickel phone subscriber before installing the Hoefer system, or to publish a notice to that effect in its directory or the newspapers, or in some other appropriate way commit itself upon this matter of the charge for the service.

You will, of course, understand that in this communication we are dealing only with the legal questions presented and have not assumed or considered to pass upon the question of the practical operation of the Hoefer system. The installation of the Hoefer system would in no event be justifiable unless it effects an improvement in the service.

Yours truly,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 6, 1914.

BERT. H. PECK, Esq., City Telephone Supervisor.

Dear Sir:

We are in receipt of your communication of January 30th requesting an opinion in regard to whether the Chicago Telephone Company, under the circumstances described in your communication, has the right to collect a nickel from nickel telephone users who call a department in the premises of a subscriber having a private branch exchange, and are informed by the telephone company's operator that he is unable to give them telephone service to the department called.

Among the regulations printed on page x of the Chicago Telephone Company's directory of October, 1913, is the following:

"In Nickel Coin Box Service a five-cent piece shall be dropped into the slot, in accordance with instructions on the instrument each time a local call is made, and will be retained by the company if the subscriber is put into

communication with any one at the telephone number called for."

Under the provisions of subdivisions (d) and (e) of Section 2 of the telephone company's ordinance of May 26, 1913, the company is entitled to collect from nickel 'phone users for each "outgoing message."

A "message" is not defined in said ordinance or in the telephone company's ordinance of November 6, 1907, to which the said ordinance of May 26, 1913, is supplementary.

A further regulation published on page x of the telephone company's said directory is as follows:

"A local message is a communication not exceeding five minutes' duration between subscribers' stations within the same exchange limits."

Subdivision (g) of Section 6 of said ordinance of November 6, 1907, and Subdivision (j) of Section 2 of said ordinance of May 26, 1913, both of which are entitled "Meters on Measured Service Lines," contain the following provision:

"The Chicago Telephone Company shall not make any charge for a conversation or message to its telephone lessees, subscribers, patrons or users unless a conversation or message has been actually transmitted, except in cases herein expressly provided."

The only cases which would be covered by the language "except in cases herein expressly provided," as used in the last quotation, would be cases where the conversations or messages did not equal the number of messages guaranteed by the subscriber.

When a nickel 'phone user is informed by the telephone company's operator that the operator cannot give him service to the department called it is manifest that the subscriber has not "been put into communication with any one at the telephone number called for," which is the condition stated in the company's above mentioned regulation upon which the company is to retain the calling party's nickel; nor has there been a "communication not exceeding five minutes' duration between subscribers' stations within the same exchange limits," which is the company's above quoted definition of a local message; nor has "a conversation or message been actually transmitted," which the said ordinances make a condition

to any charge by the company, with the exception above mentioned.

It would appear that in the cases referred to in your communication the nickel is retained by the telephone company not as a charge for putting the calling party into communication with some one at the telephone number called, but as a charge for informing the calling party that the company's operator is unable to give them service to the department called for.

If, during nights and holidays, there was no way of calling any one at the subscriber's station having a private branch exchange, the telephone company doubtless would not claim that it could retain a calling party's nickel for informing him that a connection could not be had with the called number.

We see no real difference between the case stated and a case where the company knows that one or more departments served by a private branch exchange cannot be reached, and so informs the calling party.

We do not think that in such cases the telephone company's operator can be considered as a substitute for the private branch exchange operator. The telephone company's operator is employed by the telephone company; his time and service belong to the company exclusively, and any service that he performs must properly be considered as a service for and in the interest of the company, and not as the agent of the subscriber.

Even if the telephone company's operator should be considered as the agent of a subscriber having a private branch exchange in informing the calling party that he cannot be connected with the department called for, nevertheless the above quoted explicit provisions of the company's ordinances, and of its regulations fixing the conditions upon which a charge may be made, would not be met under the conditions described in your communication.

We are of the opinion that the Chicago Telephone Company cannot lawfully retain the nickel of a calling party upon informing him that the operator is unable to give the calling party service to the department called in the premises of a

subscriber having a private branch exchange, under the circumstances described in your communication.

Yours truly,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 13, 1914.

HON. JOHN WHITMAN, Superintendent, House of Correction.

Dear Sir:

In regard to your letter of the 7th instant, annexed hereto and returned herewith, we will say that it is provided by Article V, Section 5, of the Cities and Villages Act, that "no prosecution, recovery or acquittal for the violation of any ordinance shall constitute a defense to any other prosecution of the same party for any other violation of any such ordinance, although the different causes of action existed at the same time, and, if united, would not have exceeded the jurisdiction of the court or magistrate.

We may note here that the word "not" seems to have been inserted in the last paragraph of this quotation by mistake. Probably it was meant to read, "would have exceeded the jurisdiction of the court or magistrate."

By Section 7 of the same article it is provided that "any person upon whom any fine or penalty may be imposed may, upon the order of the court or magistrate before whom the conviction is had, be committed to the county jail or the calaboose, city prison, work house, house of correction, or other place provided by the city or village for the incarceration of offenders, until such fine, penalty and costs shall be fully paid: *Provided*, that no such imprisonment shall exceed six months for any one offense."

And a similar provision is contained in Section 1 of the statute of 1879, dealing with the subject of punishment of persons for violating ordinances. Jones & Addington in their new Annotated Statutes intimate that probably Section 7 of Article V is repealed by this later law of 1879, but, so far as

regards the question now under discussion, it makes no difference whether the second statute is or is not to be regarded as repealing the first.

In several cases, the latest of which is the case of the *City of Chicago v. Coleman*, 254 Ill. 338, the Supreme Court of the state has decided that the judgment in cases of prosecutions for violations of city ordinances must expressly limit the imprisonment to six months.

It is, of course, conceded that the fines for different offenses may be cumulative. The question is whether the imprisonment may be cumulative so as to cause the same person to suffer a continuous imprisonment of more than six months by reason of several convictions for violations of city ordinances.

I am unable to find that this question has ever been expressly passed upon by either the Supreme or the Appellate Court of this state.

It will be noted that in each of the sections quoted or referred to above, the six months limitation is qualified by the words "for any one offense." These words would seem to imply that, where there are several offenses and several judgments, the total term may be made to exceed six months. I know of no principle of law which conflicts with this implication. To hold that the limit of six months is an absolute limit, which cannot be exceeded no matter how many different offenses may have been committed, would, in effect, be to hold that a man might commit any number of offenses, and that, if he had no means to pay fines, save by imprisonment and work, he could only be punished for one offense.

I am, therefore, of the opinion that in the particular case stated in your letter, Judge Sabath had the power to make the two terms of imprisonment cumulative, or, in other words, to make one sentence commence at the expiration of the other.

Yours very truly,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

Encl. Letter of Whitman.

FEBRUARY 16, 1914.

HON. CHARLES C. FITZMORRIS, Secretary to the Mayor.

Dear Sir:

I have your communication in which you state that Washington's birthday, the 22nd day of February, falls upon Sunday and that Tuesday, the 24th day of February, is primary election day; that these days are legal holidays and that on legal holidays the city hall is closed. In view of the fact that Washington's birthday falls on Sunday, the Monday following will be a legal holiday instead of Sunday, which will result in both Monday, February the 23rd, and Tuesday, February the 24th, being legal holidays and according to custom, will necessitate the closing of the city hall on those days. You ask whether, in view of these facts, if you shall issue the customary proclamation for closing the city hall on a holiday to cover the two days in question.

Section 17 of an act of the legislature, in force July 1, 1874, as amended May 10, 1909, Hurd's Revised Statutes of 1911, page 1590, provides that:

"The following days, to wit, * * * the 22nd day of February * * * are hereby declared to be legal holidays * * *. When any such holidays fall on Sunday the Monday next following shall be held and considered such holiday."

Section 21 of an act in force July 1, 1901, Hurd's Revised Statutes of 1913, page 1017, provides that:

"The days upon which the general, state, county or city elections shall hereafter be held in any such city * * * shall be holidays * * *."

The precise question of whether the section above quoted applies to city primary elections has never been passed upon by our Supreme Court, but in giving effect to the language of the section we have taken into consideration the continuous, uniform and general procedure adopted and adhered to by the municipal government and our city banking institutions for a long period of time. It has been the practice with both the city officials and the banks in Chicago to regard primary election days as holidays.

I do not think that the fact that these two holidays happen in the present instance to come together changes the sit-

uation with respect to the custom which has been always in vogue in the city hall, of closing the various departments, with certain exceptions, upon legal holidays.

I think you may prepare the notice for closing the city hall upon Monday, February 23rd, and Tuesday, February 24th, respectively, Washington's birthday and primary day, as though these holidays had fallen upon other than consecutive days.

Yours respectfully,

JOHN W. BECKWITH,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 25, 1914.

HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

In your letter of recent date you stated that you were informed that this department had rendered an opinion to the effect that Section 116 of the Chicago Code of 1911 does not prohibit a theater operator from attaching coupons to his tickets and giving away merchandise for certain numbers of them in the same manner as merchandise is given away by means of trading stamps, and you ask for an opinion so that the Department of Police may interpret the law properly.

Your information on this subject is correct. Section 116 does not prohibit the giving away of merchandise if it is not done by chance or by lot. The law department has been called upon for numerous opinions relating to the distribution of prizes and merchandise by theater owners. While the opinions given on this subject are entirely consistent, we can readily understand how some confusion may have arisen because they in each case took up only one phase of the matter. In order that the mistaken interpretation, by the police, of our opinion of December 24, 1912, may be cleared up, we take occasion to review briefly the principal opinions given on this subject and to point out a line of conduct for you to follow.

The portion of Section 116 which has been under consideration so many times reads as follows:

“All licenses for entertainments of any of the foregoing classes shall contain a proviso that no gaming, raffle, lottery or chance, gift, distribution of money, or article of value, shall be connected therewith or allowed by the person obtaining such license, or in any wise permitted to be held out as an inducement to visitors; * * *”

On October 25, 1911, in response to an inquiry concerning the issuance of trading stamps or coupons of fixed value with tickets at theaters, we advised the general superintendent of police that the distribution of same to all patrons alike was not contrary to law. Such distribution is in effect simply a reduction of the price of the ticket to the extent that the coupon or trading stamp may have a value. There is no element of chance whatever connected with it. We pointed out that the comma which appears after the word “chance” was a misprint, that it should be ignored, and that if it was to be regarded as having any significance it would lead to an absurdity. We also called attention to the fact that when the ordinance was first printed (Council Journal, December 17, 1909, p. 2152), this comma did not appear. The meaning of the clause in question is obvious, and it was clearly intended to prohibit a “chance” gift or distribution of money or other article of value.

On November 10, 1911, in a letter addressed to the Adams Candy Company, which proposed to issue numbered coupons and then distribute candy to prize winners selected at random, we held that such a distribution would be contrary to the ordinance, because the element of chance remained. The purchaser of the ticket had no means of knowing whether his coupon bore a number that would be selected, and he was therefore playing a lottery when he purchased a ticket, regardless of the fact that the determination of the prize winners was otherwise than by a drawing.

On November 2, 1912, we gave an opinion to the general superintendent of police to the effect that he could not prevent the distribution of gifts in a theater where the party making the distribution arbitrarily selects persons among the audience to whom he presents the articles. We called at-

tention in that opinion to the strong language used by the Supreme Court in the case of *Thomas v. People*, 59 Ill. 160, holding that prizes could not be distributed in a "just and legal manner" unless the number of purchasers was the same as the number of prizes and the prize received proportional as nearly as possible to the amount of money paid, and we further stated that the scheme proposed would undoubtedly lead to abuse if generally followed, but we felt compelled to hold that since there was no element of chance, in spite of what must be an unjust discrimination where persons are selected arbitrarily for prizes, there was no authority under the ordinance to prevent it. The person making the distribution was simply giving something away, and while in a certain sense the people in the audience on entering thought they had a chance to receive these gifts, each in fact knew that he could receive such a gift only if the person making the distribution saw fit to select him for the purpose.

On November 25, 1912, we had occasion to advise the city collector that the distribution of checks by the owners of a five-cent theater was not contrary to law. The check in question, purporting to be for fifty cents, was payable to the order of bearer subject to the conditions printed on the back. The condition imposed was that the holder was entitled to the sum on the face only in case a new account was started or a safety deposit box was rented at the bank on which it was drawn. In other words, it was simply an advertisement containing a privilege common to all patrons which was of no value unless the holder availed himself of it by trading with the advertiser, and could be distributed to theater patrons as well as to others without violating the law.

On December 24, 1912, in an opinion to the general superintendent of police, we held that the distribution of prizes in a theater in a guessing contest carried on by the theater management even where they allowed parties who do not enter the theater to participate, was contrary to the ordinance. We stated in the opinion that this department in passing on a similar plan was compelled to hold that persons engaged in an ordinary mercantile business had a right to distribute cards entitling holders to chances on a prize if such distribution was

made to any one desiring a card regardless of whether he was a patron or not; but that the same rule did not hold good with regard to places of amusement on account of the extraordinary powers of the municipality over that class of business and the fact that the city had availed itself of that power and passed the ordinance prohibiting the chance distribution of gifts, money or articles of value in such places.

It will be seen that the last opinion mentioned did not in any way conflict with former opinions on the subject. But it seems that it was misconstrued and interpreted to mean that a distribution of gifts in other ways than by chance was prohibited in theaters. This misunderstanding arose on account of placing the wrong meaning on the language we used when we referred to Section 116, of which we said: "Such a condition may be imposed on owners of theaters under Clause 41, etc." This was said in regard to the prohibition of chance distributions open to outsiders as well as patrons, in such places, as distinguished from chance distributions open to outsiders as well as patrons in an ordinary mercantile business, and the question of a distribution of gifts by means other than by chance was not even under consideration in that case. Hence, the language did not warrant the assumption that all gift distributions were prohibited, and did not authorize a return to the mistaken idea formerly entertained by the members of the police department that the distribution of coupons or trading stamps of fixed value was contrary to the provisions of Section 116.

The prohibition or proviso in the license for a place of amusement, as required by the clause of Section 116 quoted above, means that the owner or person operating the entertainment, in accepting the license, agrees that in connection with such place there shall be—

- (1) No gaming.
- (2) No raffle.
- (3) No lottery.
- (4) No chance gift.
- (5) No chance distribution of money.
- (6) No chance distribution of article of value.

While we do not express any opinion at this time as to

whether the City Council has exhausted its power on the subject or whether it may or may not go farther and prohibit *any* distribution of gifts, money or things of value either by chance or otherwise, there is no doubt that the ordinance as it now stands prohibits only a *chance* distribution.

It is easy to see how conditions may arise that will cause the City Council to take further action. But it is not necessary to define the exact limits of the power of the City Council in this respect at the present time. It is sufficient to say that, so far as it has gone, the prohibitions contained in the license are valid and enforceable, and these prohibit *all chance distributions* in connection with entertainments of any class.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 25, 1914.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Your favor of the 16th instant, in which you ask to be advised if it will be necessary to obtain evidence of insurance on the part of the contractor under the so-called "Workmen's Compensation Act," has been handed the undersigned for reply.

Section 31 of said act provides that if the principal or principals "does not require of the person, firm or corporation undertaking to do such work for said principal or principals, that such person, firm or corporation undertaking to do such work shall insure his, their or its liability to pay the compensation provided in this act * * * shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this act."

Your question can be satisfactorily answered by ascertaining what is meant by the word "require" as used in said act. In view of the fact that various decisions have been

handed down to the effect that the word "require" as used in certain acts is synonymous to the word "compel," see:

Meagher v. Van Zant, 2 Pac. 57, 58, 18 Nev. 230;

State v. McCord, 8 Kans. 232, 239, 12 Am. Rep. 469; and also to the effect that the word "require" means "to insist upon having * * * to exact; to claim as indispensable,"

Kennedy v. Falde, 29 N. W. 667, 670, 4 Dak. 319;

it is our opinion that it becomes mandatory upon the City of Chicago to satisfy itself that the provisions in the contract with reference to liability insurance are properly complied with on the part of the contractor.

We would therefore suggest that the contractor in all cases where he is required to take out satisfactory insurance, produce evidence by submitting to you for your inspection the policy of insurance taken out by him, and that you make a memorandum of the date, number, company (form of policy if possible) and other particulars which you can keep on record in your department for the purpose of satisfying, when requested, any court that may so require of you evidence that such policy has been taken out.

Yours truly,

LOUIS SALINGER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 26, 1914.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

Your letter of recent date transmitting the ordinance requiring elevated railroads to construct stations at such places as the City Council may prescribe from time to time, which was passed by the City Council on January 5, 1914, and vetoed and re-referred to your committee on January 12, 1914, was turned over to the undersigned for consideration and reply. You ask for an opinion on the points raised in

the Mayor's veto message and for a redraft of the ordinance in conformity with such opinion.

You will no doubt remember that although the ordinance was drafted in this department there was doubt expressed as to whether the same could be enforced. It was sent to you in response to a request for same. Since this was done a somewhat similar ordinance relating to the stationing of flagmen at points to be designated by the City Council came up for an opinion by reason of the fact that the railroad companies refused to comply with same.

We therefore thought it advisable to inform the Mayor of the defect in the ordinance which your committee recommended, and which was passed, in order that a similar result might be avoided.

The vetoed ordinance does not prescribe a fixed rule of conduct, but leaves it open to the City Council to designate, from time to time, points at which stations are to be constructed without any limitation whatever on the action of the City Council. Such an ordinance was held invalid in the case of *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, and in a number of other cases.

The law permits some discretion on the part of an executive officer and some latitude on the part of the City Council when a general rule of conduct is laid down by ordinance, but the limitation may be expressed by saying that such discretion or latitude can only be exercised to the extent that it is impossible to make the provisions of a general ordinance apply.

In other words the ordinance must prescribe as fully as possible the requirements or line of conduct to be followed and then if there is anything left uncovered it may be supplied through the exercise of the discretion of an executive officer or further action of the City Council.

The above in brief is the principal objection to the ordinance that was passed. Another objection was that there was no provision in same which could be looked to in case the ordinance was construed as extending or enlarging the rights of the elevated railroad companies. There was also some doubt as to whether, by reason of the frontage consents ob-

tained by the elevated companies in certain streets the same could be applied in all cases. As to the last mentioned objections, they are minor matters, although we have taken them into consideration in framing the new draft.

The new ordinance which we transmit herewith is drawn along the lines that we have indicated above. It requires new stations or landing places under certain fixed conditions. The conditions we have named in the ordinance may not be entirely satisfactory to your committee, but they furnish a basis for you to work on, and in case you desire to have them changed it can readily be done.

We have, however, endeavored to submit a draft which we believe will be satisfactory.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 26, 1914.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Pursuant to your instructions I have examined the validity of the proposed amendment to the Code *in re* Police Duties as suggested by former Judge McKenzie Cleland.

The new portions of the amendment are as follows:

“Provided, that when a person who is not a vagrant is found upon the public streets or public places in an intoxicated condition only, and is not acting in a disorderly manner or committing a breach of the peace, it shall be the duty of the officer to ascertain, if possible, the place of abode of such intoxicated person and take him or her thereto, provided such place of abode shall be within the limits of the post of duty of such officer.

Should the place of abode as ascertained be outside of such limits or should the officer not be able to ascertain such place of abode, then the intoxicated person shall be taken to the police station and placed in a cell for safe-keeping, and such person shall be released whenever in the judgment of the officer in charge of said station he or she may with safety to himself or herself be allowed

his or her liberty, provided such detention shall not exceed ten hours, and provided further that such person shall execute a waiver in writing of all claims for such detention."

I find serious objections. The ordinance and Judge Cleland's letter assume that a person may be found upon the street or in a public place in an intoxicated condition and not be disorderly or committing a breach of the peace.

The letter states: "As you are aware, drunkenness is not made an offense by the municipal code." This is true in so far as the code is concerned, but not true when considered with the statutes of Illinois.

Section 64 of Division 1 of Chapter 38 provides:

"PUNISHMENT.) Any intoxicated person found in any streets, highway or other public place, or so found disturbing the peace of the public, or of his own or any other family in any private building or place, shall for the first offense be fined not more than \$5, and upon any subsequent conviction shall be fined not exceeding \$25. Prosecutions under this section shall be commenced within thirty days after the offense is committed, and the justice of the peace may remit the punishment, in whole or in part, when he is satisfied the public welfare and the good of the offender require it."

This makes drunkenness an offense against the laws of the state whether it amounts to a disturbance of the peace or not. No ordinance placing a different construction upon drunkenness would be good.

Having established that being found in an intoxicated condition in a public place is a criminal offense, the duty of the police officer as to such person is fixed by the statute.

Section 2 of Division 6, Chapter 38, provides:

"It shall be the duty of * * * every policeman * * * when any criminal offense * * * is committed or attempted in his presence, forthwith to apprehend the offender and bring him before some justice of the peace to be dealt with according to law."

The statute requires the police officer to arrest a man found drunk upon the streets; the proposed ordinance requires the police officer not to arrest him but to do something else. Such an ordinance would be invalid while the present statutes stand.

There are a number of other legal objections to the proposed ordinance, but in view of the conclusion already reached it will not be necessary to call attention to them.

It is fair to say that the police are already acting on the theory that it is better to help respectable offenders to their homes when it can be done than to lock them up. For this reason only a small proportion of the men who come to the notice of the police ever come into the police court or to the station. Judge Cleland writes that 50 per cent. of the cases brought to trial are dismissed.

This is not equivalent to saying that 50 per cent. of the arrests should not have been made. The judges in most instances discharged the prisoners because they had been punished enough or out of consideration for their wives and children.

The unjust and wasteful policy of treating drunkards in the same manner as criminals has long been appreciated by writers. Massachusetts as early as 1891 adopted a law by which intoxication in a public place is made an offense. Any person so arrested may as soon as he recovers be released upon furnishing a certain statement as to himself and request for release and if it appears that he has not twice within the past twelve months been arrested for drunkenness. At the next session of court these statements are presented to the judge who passes on the cases without the necessity of presence of the accused. If the court sees fit he can order a summons or a warrant issued, or he files the statement without any action. Means are provided for verifying the statements as to former arrests. Probation of drunkards is also provided. The statute provides that if the person refuses to make the request for release he is to be charged with the offense of drunkenness and if he does make the request, it operates to release the officer of any claim for false arrest.

In Massachusetts in 1909 there were 90,550 arrested. Of this number 78,450 made the optional statement, 67,821 were adjudged to be true, and 33,798 were released without trial.

New York in 1910 borrowed the Massachusetts idea. It created a Board of Inebriates with elaborate systems of records and probation. Release upon request was only extended

however to persons not offending within a year, while Massachusetts allowed two offenses within that time.

In conclusion I beg to state that if the innovations suggested by Judge Cleland are desired they can only be obtained through appropriate legislation at Springfield.

Very respectfully,

GEO. L. REKER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

FEBRUARY 27, 1914.

TO THE HONORABLE, THE COMMITTEE ON FINANCE, CITY OF
'CHICAGO.

Gentlemen:

Under date of February 2, 1914, the Law Department submitted to the Mayor and City Council an opinion relative to the so-called "Workmen's Compensation Law" and its effect in cases where city employes are accidentally killed or injured in the course of their employment. Said communication was ordered published and referred to the Committee on Finance. (See Journal, February 2, 1914, p. 3773.)

Afterwards, on the 6th day of February, 1914, at a meeting of the Committee on Finance, on motion duly carried, it was ordered that the Corporation Counsel, the City Attorney and the sub-committee on personal injuries (of the Finance Committee) be directed to devise a plan to carry into effect the Workmen's Compensation Law and report to the Committee on Finance.

In accordance with said order and direction, we, the undersigned, respectfully submit the following:

BUREAU OF WORKMEN'S COMPENSATION.

In view of the fact that all claims and suits against the city for personal injuries are now referred to and handled by the City Attorney's office, it would seem that said office is peculiarly adapted to handle claims arising under the Workmen's Compensation Act.

A Bureau of Workmen's Compensation might be created to work in conjunction with the City Attorney's office and under the direction of the City Attorney. Some attorney in the City Attorney's office should be placed in charge of said bureau and all workmen's compensation claims should be assigned to him to be handled as hereinafter set forth.

ACCIDENTAL REPORTS, MEDICAL AID, ETC.

Under the present system when a city employe is injured and incapacitated in the course of his employment, several days elapse before the accident is reported to the City Attorney's office.

In view of the fact that under the Compensation Act, the city is required to provide necessary first aid medical, surgical and hospital services (see Sec. 8 a) it will be necessary to have all such accidents immediately reported. The immediate foreman or superior of the injured employe should be required to send in a report by phone to the chief investigator in the City Attorney's office, whose duty it shall be to immediately send a city physician to attend the injured man. The chief investigator shall also cause to be made a preliminary investigation of the accident.

The city physician should, as soon as practicable, examine, diagnose and make a written report of the case to the City Attorney's office.

The immediate foreman or superior of the injured employe shall, as soon as practicable, make a written report of the accident to the head of his department, on blanks to be furnished for that purpose, which said report or a copy thereof, shall be immediately transmitted to the City Attorney's office.

After the chief investigator shall have made a complete investigation of the accident, he shall make a report thereof, and transmit the same, together with the physician's report and all files and papers in the case to the Compensation Bureau.

The head of the bureau shall try to negotiate a settlement of the claim in accordance with the provisions of the Compensation Act, and shall keep in touch with the claimant

and have supervision of the matter until it is finally disposed of.

In the event the claim cannot or should not be adjusted by the Bureau of Compensation, then in that case, the head of the bureau shall attend to the matter before the Industrial Board and elsewhere as the matter requires.

COMPENSATION PAY ROLL.

When an employe of the city, who is eligible to receive compensation under the act in question is injured and incapacitated in the course of his employment, he should be dropped from the pay roll at the end of the working day of the accident, and in view of the fact that the compensation allowed or awarded him must be paid in installments at the same intervals at which wages were previously paid him (Sec. 7 c and Sec. 8 L), a special pay roll should be kept by the chief clerk of the City Attorney's office or the head of the Bureau of Compensation, and if the period of incapacity is more than six days, his name should be placed on said special or compensation pay roll at the rate of compensation per week that he will by law be entitled to, beginning with the eighth day of his incapacity.

THE COMMITTEE ON FINANCE TO APPROVE REPORTS, ETC.

Before an injured employe's name shall be placed on the compensation pay roll the head of the Compensation Bureau shall make a report of the claim to the Committee on Finance, or some sub-committee thereof, with his opinion and such recommendation as the case requires, and if the report and recommendation are approved the Bureau of Compensation shall place such injured employe's name on such special pay roll and pay slips shall be issued to him in such amounts and at such intervals as by law required, and in such manner as the Committee on Finance shall direct.

ORDINANCE.

In order to carry out the provisions of the Compensation Act and provide for the payments in installments as aforesaid, it may be necessary or advisable to appropriate from the cor-

porate funds of the city, a fund of dollars, from which such payments and other expenses of carrying out the terms of the law can be made. That being the case, an ordinance should be drawn covering the whole question and passed by the City Council.

The ordinance, among other things, might provide that all moneys paid out for compensation should be charged to the department in which the employe was injured at the time of the accident.

COUNCIL PETITIONS.

If the provisions of the Workmen's Compensation Act are to be carried out as above set forth, it would seem that council petitions by employes of the city, who are injured in the course of their employment should be discontinued.

Respectfully submitted,

JAMES J. O'TOOLE,
Assistant City Attorney.

Approved:

N. L. PIOTROWSKI,
City Attorney.

Approved:

WM. H. SEXTON,
Corporation Counsel.

FEBRUARY 27, 1914.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

We are in receipt of a letter signed by the Deputy Commissioner of Public Works asking for an opinion as to the legality of an order passed by the City Council on February 9, 1914, directing the Commissioner of Public Works to refuse to receive or consider bids on city contracts from contractors who have violated existing written contracts with their employes.

The said order reads as follows:

"WHEREAS, It is the sense of the City Council of the City of Chicago that sound public policy in the letting of contracts would seem to require that no bids be entertained from or contracts for public work let to, con-

tractors who have violated existing written contracts with their employes; now, therefore, be it

ORDERED, That the Commissioner of Public Works be and he is hereby directed to insert in all proposals for bids for city contracts a provision that no bid or bids will be received or considered by him where it appears that the foregoing conditions prevail."

It may readily be conceded that it would be conducive to the best interests of the municipality if contracts could be limited to persons who have not violated any existing contracts with any one, whether employes or others, in any way. The city is frequently put to delay and loss by reason of letting a contract to some one who fails to meet his obligations or has difficulties with his help or with other parties and is therefore unable to fulfill his contract with the city. In such cases, while the city is protected by a bond, there results a loss which cannot ordinarily be measured in exact figures.

It is to overcome the disadvantages of making a contract with unreliable persons that a measure of discretion is lodged in the city's executive officers both by statute and by ordinance. But this discretion cannot be so exercised as to eliminate from the bidding all persons who have been found by other persons to be unreliable in some particular way. Moreover, it could not be ascertained in many instances by anything short of a judicial proceeding whether a party has violated an existing agreement or not. This would lead to discrimination and entail further complications that would finally result in practically nullifying any rule that might be laid down for disqualifying any one from bidding even if the executive officers of the city regarded them as unreliable in this respect.

The courts would undoubtedly uphold provisions of an order or ordinance that authorize you to reject a bid from a contractor who has defaulted on a contract, or one who is indebted to the city in any way, or one who has made a claim for extras that is contested by the city. But a provision which singles out a special form of moral shortcoming in the contractor's conduct to others, and which declares that this shall disqualify him as a bidder on all city contracts would not stand the test of validity.

It has been repeatedly held by our courts that ordinances imposing some special requirement on a contractor as to the manner in which he conducts his business when he undertakes some public work are invalid. Thus, a clause requiring union labor on a contract is not lawful.

Adams v. Brennan, 177 Ill. 194;

Holden v. City of Alton, 179 Ill. 318.

In like manner, a provision in a contract requiring that eight hours shall constitute a day's work on same, is void.

Fiske v. People, 188 Ill. 206.

A provision prohibiting the employment of any person who is not a native born or naturalized citizen is illegal.

McChesney v. People, 200 Ill. 146.

Dillon on Mun. Corp. (5th Ed.), Sec. 118.

An act which provides that if a railroad company refuses to pay the amount due to its employes under certain conditions it is liable to a penalty is unconstitutional.

San Antonio & A. P. R. Co. v. Wilson, 4 Tex. App. 570.

A statute which requires a corporation to pay wages weekly, was held to be unconstitutional in this state.

Braceville Coal Co. v. People, 147 Ill. 66.

It will thus be seen that any attempt to enforce the provisions of the order in question will be met with the usual objections to legislation of this character, on the theory that it is a deprivation of liberty and property without due process of law, that it is subversive of the right of contract, that it denies citizens of the equal protection of the law, etc.

Inasmuch as such a provision as is contemplated here, if enacted in any form, would be invalid, it follows that any taxpayer would have the right to enjoin the city from letting a contract where the city officers made such a limitation on the right to bid as is proposed.

We are therefore compelled to hold that the order is contrary to law and cannot be enforced. If it were possible to enact a valid provision of this kind it would be necessary

to alter it from its present form in any event, since it is not in the proposal but in the specifications that a provision for rejecting bids should be inserted, and moreover it would be necessary to pass an ordinance instead of an order.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 2, 1914.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

On October 1, 1913, we rendered an opinion in compliance with the comptroller's request of October 23, 1913, holding that the interest on special assessment bonds was not subject to the income tax law. On December 4, 1913, the Treasury Department at Washington, by the commissioners of internal revenue, in Treasury Decision 1910, held that irrigation and reclamation assessment districts are not political subdivisions of the state nor are they public utilities exercising any essential governmental functions accruing to any state or territory, within the meaning of the Federal Income Tax Law and that interest or income from bonds or other obligations of such districts is not exempt from the income tax.

This decision was predicated on an opinion rendered by the solicitor of the Internal Revenue Department. The matter came to my notice and I immediately saw that this decision included within its scope special assessment bonds of the City of Chicago. I immediately went to Washington, and, in conjunction with legal representatives of various bond houses in this country, protested against this decision as being in contravention of paragraph b, Section 2, of the Income Tax Law, which reads as follows:

“That in computing net income under this section there shall be excluded the interest upon the obligations of a state or any political subdivision thereof. * * *”

As a result of our efforts the Secretary of the Treasury directed that the collection of income tax on obligations of the character mentioned in Treasury Decision 1910 be suspended until January 15, 1914, and thereafter until a subsequent ruling was made. Later on the matter was submitted to the Attorney General of the United States for an opinion. On January 30, 1914, this officer held that:

“Special assessment districts created under the laws of the several states for public purposes, such as the improvement of streets and public highways, the provision for sewerage, gas and light, and the reclamation, drainage or irrigation of bodies of land within such special assessment districts when such districts are for *public* use, are political subdivisions of the state,”

within the meaning of paragraph b, Section 2, above quoted by me.

On February 10, 1914, the Treasury Department, by the commissioner of internal revenue, in Treasury Decision 1946, addressed to the collectors of internal revenue, directed that in conformity with said opinion of the Attorney General the income derived from special assessment bonds should be excluded in computing the net income for the income tax and that said decision superseded Treasury Decision 1910.

Interest on special assessment bonds, therefore, is not included within the Income Tax Law.

Yours very respectfully,

WM. H. SEXTON,
Corporation Counsel.

MARCH 2, 1914.

HON. J. C. McDONNELL, Chief, Bureau Fire Prevention and Public Safety.

Dear Sir:

Your communication of the 19th instant, directed to this department with reference to high explosive licenses and bonds has been handed to me for reply.

The first question which you would like to have answered by this department is as follows:

“Is a separate license and bond for high explosives necessary where a person, firm or corporation having its

business located in two or more places in the city, desires to keep on hand, explosives at each place and conduct blastings at each location?"

In answer to this question, we cite the following sections of the Code in the ordinances of July 22, 1912, and printed on pages 1582 and 1583 of the Council Journal of said date, which ordinance created the Bureau of Fire Prevention and Public Safety.

"Section 190. All contractors and others now engaged in or proposing hereafter to engage in, any blasting operations, shall make application in writing, upon blank forms to be furnished by the Bureau of Fire Prevention and Public Safety to the Chief of Fire Prevention and Public Safety for a license to keep and use explosives, giving the name of applicant, location of office or place of business, the nature of the work to be performed, the site of such proposed work, the location of the magazine or magazines in which it is intended to keep such explosives and the quantity and kind of explosives to be kept therein."

"Section 203. Every person now engaged in, as principal, or purposing hereafter to be connected with any blasting operations, shall, as hereinafter set forth, make an application to the Chief of Fire Prevention and Public Safety for a permit to keep and use high explosives, giving at the time, in writing, name of licensee, location of office or place of business, occupation, proposed location of the magazine or magazines, together with plans and descriptions of the construction of such magazine or magazines, the quantity or kind of explosives proposed to be kept therein and the names of employes required to have certificates of fitness. It shall be unlawful for any licensee to move or cause to be moved, any magazine after once having received a permit for the use of same, until such licensee shall make application to the Chief of Fire Prevention and Public Safety for permission so to do and shall have secured a permit for such purpose from the Chief of Fire Prevention and Public Safety, and every application for such permit shall specify the place for which it is desired to locate the magazine proposed to be moved."

From reading the above sections, you can readily see that among other things, there must be set out in the application, the exact nature of the work to be performed, the site of such proposed work, the location of the magazine in which it is

intended to keep such explosives and the quantity and kind of explosives to be kept.

Section 188 of said ordinance above described provides:

“Section 188. Upon receipt of said application the Chief of Fire Prevention and Public Safety shall cause to be made an investigation for the purpose of ascertaining whether the place at which it is desired or intended to keep said explosives is such a one as would not be so dangerous as to constitute a nuisance or be a menace to the safety of the public or the adjoining property.”

The license fees as required by said ordinance was exacted by the city to meet the expenses of the supervision and inspection of said locations and where two or three locations in different parts of the city are to be mentioned in the same application, it would require double time and expense of the city to make said investigations and supervisions pertaining to each location.

After reading the above sections and other sections pertaining to said ordinance, we have come to the conclusion that where a person, firm or corporation has several locations for blasting, they should bear their proportion of the extra expense to the city to supervise and investigate the said locations and therefore a separate license and bond should be exacted and required for each location wherein blasting is to be conducted.

Your second question in said letter is as follows:

“With reference to a railroad company transporting explosives to and from more than one freight house on its line within the city, is a bond in the sum of five thousand dollars (\$5,000) sufficient?”

In reply to this last question, we quote Section 191 of said ordinance on page 1583 of the Council Journal of July 22, 1912, which is as follows:

“Section 191. Previous to the issue of licenses as herein prescribed, applicants shall furnish and file with the Chief of Fire Prevention and Public Safety a bond, with sureties, approved by the City Comptroller, conditioned for the payment of any loss, damage or injury resulting to persons or property by reason of the use, sale or keeping of such explosives, and for the strict observance of the ordinances of the City of Chicago relating to the subject

of these explosives and substances referred to in Section 186 hereof. Said bond shall be in amount as follows, to wit:

(a) For manufacturers, agents and all others who desire to bring to or sell within the corporate limits of the city such explosives as are designated in Section 186 hereof, a bond in the penal sum of five thousand dollars, and in case of delivery being made by wagons, an additional sum of five thousand dollars for each and every wagon in excess of one wagon engaged within the city in the delivery of such explosives."

After reading the above section, we conclude that a bond in the sum of five thousand dollars (\$5,000) is sufficient except where the delivery is being made by wagons, and in that event an additional sum of five thousand dollars (\$5,000) is required for each and every wagon in excess of one wagon engaged within the city in the delivery of such explosives.

Respectfully submitted,

JOHN F. POWER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MARCH 2, 1914.

TO THE HONORABLE, THE CITY COUNCIL, OF THE CITY OF CHICAGO.

Gentlemen:

Pursuant to an order of your honorable body passed January 19, 1914, appearing in the Journal of the City Council, page 3467, directing the corporation counsel to render an opinion as to the power of the city by ordinance to compel the People's Gas Light and Coke Company, to install gas shut-offs upon all buildings to which gas is supplied by pipes of more than three-fourths of an inch in diameter, we submit the following:

In the first instance we direct your attention to the fact that power to compel the installation of gas shut-off appliances by consumers has been held to be derived from the city's general police power on the theory that the public health and safety require the installation of the same.

The necessity for such appliances arises from the fact that great danger exists in case of fire from the gas continuing to enter a structure, thereby adding to the intensity of the fire and frequently resulting in explosions. It may be said that the gas may be shut off from the inside of such structure, but this cannot be done without danger when the fire is in the same part of the structure in which the meters and shut-off are located.

It may also be claimed that the danger does not arise through any fault of the gas company. The fact remains, however, that the danger exists and that it is the continuous flow of gas which causes the explosion or increases the intensity of the fire. It must also be borne in mind that experience shows that the flow of gas, explosions and attending danger usually result from the melting of the meters owned and installed by the gas company. Of course, that is not always true, for falling walls sometimes break the service pipes in the structure. It is our understanding, however, that the danger to be avoided is that which arises when fire is in that part of a structure in which gas meters are located.

Clause 13 of Section 62 of the Cities and Villages Act, Hurd's Revised Statute, 1912, gives the city council power—

“To regulate the openings therein for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights. Provided, however, that any company heretofore organized under the general laws of this state, or any association of persons organized or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages or the inhabitants thereof with the same, shall have the right by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose.”

From the above quoted clause it will be seen that the city may impose regulations as conditions precedent to the placing of pipes in streets, and there is no doubt but that the city may require the gas company to equip all leads from their mains hereafter placed in the streets or alleys with gas shut-offs.

Power to require gas companies to equip leads already in place with shut-offs exists, if at all, under the general police powers of the city.

In *Huntington Light and Fuel Company v. Beaver* (Ind.), 73 N. E. 1002, it was held that a gas company having knowledge of a leak in the pipes of a consumer is charged with the duty to shut off the gas to the same; so in *Memphis Consolidated Gas & Electric Company v. Creighton*, 183 Federal 552, it was held that a gas company which, through its pipes, supplies gas to a house and has control of the apparatus for cutting off same when notified that gas is escaping, owes a duty to the occupants to exercise reasonable diligence in shutting off the gas therefrom, and that it is immaterial that the pipes where the leak occurred were owned by the owner of the house. Bearing in mind the holding of the above cases, we consider it legal to impose upon gas companies the duty of installing shut-offs that may be operated with safety in case of fire or other emergency.

We are therefore of the opinion that the city may by ordinance require the Peoples Gas Light & Coke Company to install gas shut-offs to be connected with the leads of the gas company in the streets or alleys from which gas is supplied through pipes of more than three-quarters of an inch in diameter.

The installation of gas shut-offs upon such buildings by the gas company at its own expense raises the question whether such shut-offs are to be attached to the pipes owned by the gas company or to those owned by the property owner. Whether the city can compel the gas company at its own expense to install gas shut-offs to be connected with pipes or leads not owned by the gas company and to be located on property not owned by it or by the city is doubtful. We understand that the shut-offs are to be attached to the pipes or leads owned by the gas company and our opinion is predicated on this assumption.

Respectfully submitted,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 2, 1914.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

You ask to be advised whether an ordinance of the city requiring the owner of a motor vehicle to affix the vehicle license tag on the top or side of the state number plate which is carried on the front of each motor vehicle would be valid.

Since you wrote your letter of inquiry the Supreme Court has handed down a decision in the case of *City of Chicago v. Charles Francis*, in which it holds that so far as Section 2720 of the Chicago Code of 1911 requires motor vehicles other than motor trucks and motor driven commercial vehicles or motor vehicles which are used within the city limits for public hire to display a number is concerned, it is contrary to the state motor vehicle act.

There is nothing in the decision so far as we can see which will prevent the city from requiring motor trucks, motor driven commercial vehicles and motor vehicles which are used within the city limits for public hire to display a numbered license tag at any place that may be designated by ordinance, nor is there anything in the decision which will prevent the city from requiring all motor vehicles to display a tag showing that the vehicle license has been paid if such tag bears no number.

Application for rehearing in the above case has been made on the part of the city and there is a possibility of the decision being modified or altered, especially in view of the fact that the ordinance relating to the vehicle tax under which the number tags in question are issued was not before the court when it made its decision. In case the Supreme Court adheres to its decision, however, it will probably be necessary to amend the ordinances in question in order that there may be no conflict with the state law, which declares expressly that the owners of motor vehicles or motor bicycles shall not be required to display any other number than the number of the registration seal issued by the secretary of state, except as to those vehicles which are especially excluded from this general provision.

In view of the fact that this matter is still pending on a

petition for rehearing we would not consider it advisable at this time to make any alteration of the Code in this respect.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 2, 1914.

TO THE HONORABLE, THE MAYOR AND THE CITY COUNCIL, OF
THE CITY OF CHICAGO.

Gentlemen:

During the year 1899 and during certain years prior thereto the City of Chicago acquired special assessment tax certificates amounting to \$195,337.09. Since that time it has acquired special assessment tax certificates, which have not been converted into tax deeds, amounting to approximately \$329,278. In addition to these tax certificates the city has acquired special assessment tax deeds amounting to \$377,890.84, making a grand total of approximately \$902,505.93. These figures are not exact but are approximately correct.

Until quite recently both special assessments and general taxes have been accumulating on certain property in the city by reason of the failure and neglect of the owners of such property to make payment thereof, by virtue of which, in some instances, the total of the general taxes and special assessments so unpaid practically equal the fair cash value of the property upon which such taxes and special assessments have been levied.

Within the last few years a number of persons have gone to the county attorney and stated that if tax foreclosure suits were filed they would bid in at a sale held pursuant to a tax foreclosure decree the property so foreclosed at a sum sufficient to pay the general taxes due thereon together with the cost of the foreclosure proceeding, but these offers have never embodied the idea of a bid sufficiently large to take care of the amount of the special assessments that have been levied against such property. Nevertheless, within the last few

years quite a number of tax foreclosure suits have been prosecuted, decrees entered, and sales pursuant thereto held.

It is the evident purpose of the purchasers at such foreclosure sales to acquire a title that will cut off all rights that the city may have by virtue of special assessment tax certificates and special assessment tax deeds or at least the latter.

The courts of this state, because of the activities of professional tax-buyers, have always been prone to hold a tax deed to be invalid. So there is but scant hope of the city making a good title under its special assessment tax deeds if it is to be placed on the same plane as the ordinary tax buyer, and the Supreme Court of this state in the recent case of *O'Connell v. Sanford*, 256 Ill. 62, held that the city was in the same position with reference to its tax deeds as any other purchaser at a tax sale.

The statute clothes the city with ample authority to buy in property on which it has levied its special assessments when these assessments are not paid and the property is offered for sale, whenever there is a default of other bidders. But as the Supreme Court has so far seen fit to construe the statutes, the city acquires nothing that can be developed into a title when its certificate of sale ripens into a tax deed.

Much of the property that has been suffered to be sold for taxes and special assessments for a number of years is situated in the outlying portions of the city that are sparsely populated, and in not a few instances the cost of obtaining a tax deed far exceeds the amount due under the special assessment.

Under the law, if the city lets a contract for a public improvement which provides that the compensation of the contractor shall be paid out of the special assessment proceeding relative thereto, the city is not liable to pay the contract price so long as it exercises reasonable diligence to collect the special assessment. Just what duties are imposed on the municipality in order that it may be said that it has exercised reasonable diligence in collecting the special assessment so that it may avoid subjecting its general funds to the payment of the price fixed in the contract for the payment of the public improvement, has not received great attention at the hands of the

courts, although it has been held in *Conway v. City*, 237 Ill. 128, that the city has performed its full duty under the law by perfecting tax titles as to delinquent property and tendering the deeds to the contractor.

It has been the practice of the city for some years to divide special assessments either into five or ten installments, except in sidewalk cases where the assessment is payable in a single installment. If the city is to buy in the property and take out a tax deed on each installment of a special assessment as it comes due, it means that the city will hold five or ten tax deeds on a single piece of property if none of the installments of the special assessment is paid.*

It will be seen that the innovation of the county filing tax foreclosure proceedings for the collection of general taxes has created a new condition of affairs, which in turn presents two questions for consideration. One of those questions is, "What is the best method to be pursued with reference to the tax deeds which the city has already acquired" The other question is, "What is the best policy for the city to pursue with reference to unpaid installments of special assessments that may hereafter mature and in the payment of which default is made?"

The city has recently taken various steps in tax foreclosure proceedings to bring about the payment to it of the amount that it has expended at tax foreclosure sales together with interest thereon and the cost of procuring tax deeds, and by virtue of these efforts settlements have been made which, while not entirely satisfactory, have, in our judgment, nevertheless been to the best interests of the city. In most instances the amount which the city has involved in a tax deed is so small that, considered merely as a financial proposition, it would not be warranted in engaging in any extended litigation relative thereto.

Section 224 of Chapter 120 of the statutes of this state provides that in any cause where a judgment or decree is entered setting aside a tax deed there should be paid to the party holding the tax deed all taxes and legal costs together with all penalties which the holder shall have properly paid in procuring such deeds before the complainant shall have the

* Portion of opinion omitted, see page 1067 for same.

benefit of the judgment or the decree setting aside the tax deed. An act passed by the legislature at its last session provides that any municipal corporation which holds any certificate of sale or tax deed shall be entitled to reimbursement of the amount paid by it at such sale, including costs and interest at the rate of 5 per cent. per annum, and that no final judgment or decree shall be entered in any case either at law or in equity or in proceedings under the eminent domain act involving title to or interest in any land in which such municipal corporation shall be a party until reimbursement has been made to it as herein provided.

Before the act last above referred to was passed the Supreme Court of this state had held that in a condemnation proceeding to which the city was a party it was not entitled to receive, out of the compensation awarded, the amount which it had expended for its tax deed, placing its decision on the ground that in the condemnation proceeding the owner of the property was not seeking to have the city's tax deed set aside. We have not been able as yet to obtain a decision as to the rights of the city by virtue of the act last above referred to which was passed at the last session of the legislature, but we are taking steps to do so. In addition to the action last above referred to we have in a case now pending raised the question that the owner of property cannot refuse to pay taxes and special assessments levied or assessed thereon for a period of years, thereby forcing the county to file a tax foreclosure bill and then accomplish in the tax foreclosure proceeding indirectly what he could not accomplish directly in a bill to remove the city's tax deed as a cloud. That is to say, he cannot refuse to obey the law which requires him to pay taxes and force a tax foreclosure proceeding, and then in that tax foreclosure proceeding take advantage of his own wrong and free his title of any cloud occasioned by the city's tax deed without paying the amount of the city's disbursement in procuring said tax deed together with interest thereon, and that, consequently, he is estopped to question the city's claim for its disbursement and interest but that the decree of foreclosure should provide for the reimbursement of the city.

We believe that the city is possessed of plenary power to buy in, at tax foreclosure sales, property upon which it holds special assessment certificates or special assessment tax deeds, and, so that the question may admit of no doubt, the comptroller has recently, at our suggestion, purchased two lots at a foreclosure sale and we will endeavor at the earliest moment to get the question of the validity of such purchases before the Supreme Court and its decision thereon obtained.

There is in the act of the last legislature to which we have heretofore referred, language that we believe should be construed to mean that no order approving any sale under a tax foreclosure decree shall be entered unless the city is first reimbursed for any amount that it may have expended in procuring a special assessment certificate or a special assessment tax deed, together with 5 per cent. interest on such expenditure.

The fact that the recent act of the legislature follows so closely upon the heels of the decision of the Supreme Court, placing the city on the same plane as the ordinary tax buyer and denying it any relief in proceedings that are not directly instituted by the owner to clear his property of the cloud of the city's tax deed, we believe, lends much color to our contention that the legislature, by its recent act, clearly intended that no person should be permitted, under any circumstances, to ultimately avoid the payment of special assessments levied on his property and that before a judgment or decree should be entered in any proceeding affecting property, no matter how or by whom instituted, the city should be reimbursed.

We are endeavoring to get the law department of the county to construe this provision as we view it and if we succeed and can induce the courts to adopt our joint construction, we are of the opinion that the city's rights will be thereby amply protected, and we are exerting our every endeavor to accomplish the results last above mentioned.

You will therefore see that the two questions under consideration involve not only questions of law but important questions of policy, which questions of policy we believe it is

the function of the mayor and council, and not that of the corporation counsel, to determine.

While we have been forced in a few instances to determine, temporarily, questions of policy we feel disinclined to continue the policies so adopted without your expressed or tacit approval.

We therefore submit these facts for your consideration and invite such action in the premises as you may see fit to take.

Respectfully submitted,

CHARLES M. HAFT,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MARCH 2, 1914.

TO THE HONORABLE, THE CITY COUNCIL, OF THE CITY OF CHICAGO.

Gentlemen:

On December 8, 1913, your honorable body passed the following resolution:

“WHEREAS, The City of Chicago, acting under proper legal advice, did between the years 1898 and 1908 reverse certain sewers and construct certain intercepting sewers, by which all sewage between the Northern city limits at the boundary of Evanston and 87th street, near the mouth of the Calumet, a distance of 21 miles, was diverted from Lake Michigan and made tributary to the main channel or outlet provided by the Sanitary District of Chicago, so that the said sewage no longer contaminates the water supply from Lake Michigan, opposite the city front of Chicago, and

“WHEREAS, The City of Evanston still continues to pour sewage into Lake Michigan, greatly to the menace and injury of the water supply of the City of Chicago, notwithstanding the fact that an outlet by which the same can be diverted, together with other north shore towns, was constructed by the Sanitary District and opened some three years ago, and no action has been taken or provision made by the said City of Evanston looking to the diversion of its sewage from Lake Michigan; now therefore be it

“ORDERED, That the Corporation Counsel is hereby instructed to examine the subject-matter and give an opinion to this council in regard to any action that the City of Chicago may legally take for the abatement of the nuisance arising from the use of Lake Michigan as a sewer outfall for the City of Evanston, and to recommend such action as it may be competent for the City Council of the City of Chicago to authorize or take for the protection of the city from the pollution of the waters of Lake Michigan by the City of Evanston and other north shore towns.” (See page 2909, Council Journal, 1913-1914.)

The natural office of a body of water like Lake Michigan is to carry off the natural drainage of the lands adjacent thereto. But as was said in *Chapman v. Rochester*, 110 N. Y. 277, the filth of the City of Evanston does not flow naturally into Lake Michigan, as surface water finds its level, but is carried thither by artificial arrangements, a system of sewerage, prepared by the city.

The legislature has, however, authorized cities and villages to construct and maintain sewers for the purpose of draining the sewage within their corporate limits. Prior to the construction of the north shore channel of the Sanitary District of Chicago, the only outlet for the sewage of Evanston was Lake Michigan. In *Haskell v. New Bedford*, 108 Mass. 208, 214, the court said:

“One great natural office of the sea and of all running waters is to carry off and dissipate by their perpetual motion and currents, the impurities and off-scourings of the land. The owner of any lands bordering upon the sea may lawfully throw refuse matter into it, provided he does not create a nuisance to others, and there can be no doubt that public bodies and officers, charged by law with the power and duty of constructing and maintaining sewers and drains for the benefit of the public health, have an equal right * * * but it by no means follows that the city or any private person has the right to deposit filth upon the sea shore in such quantities as to create a nuisance to health and navigation.”

The law upon this question is concisely stated by Judge Dillon in the 5th Edition of his work on Municipal Corporations, Section 1740, as follows:

“Although a municipality having the power to construct drains and sewers may lawfully cause them to be built so as to discharge their refuse matter into the sea, or natural stream of water, yet this right must be so exercised as not to create a nuisance, either public or private.”

See also :

State v. Concordia, 78 Kan. 250.

Haskell v. Bedford, 108 Mass. 208.

Brayton v. Fall River, 113 Mass. 218, 227.

Richardson v. Boston, 19 How. (U. S.) 263.

Franklin Wharf Co. v. Portland, 67 Me. 46.

The pollution of water by the flow of sewage from cities or towns rendering it unfit for use has frequently been a ground for the application of an injunction.

Missouri v. Illinois, 180 U. S. 208.

Morgan v. Danbury, 67 Conn. 484.

People ex rel. v. City of San Louis Obispo, 116 Cal. 617.

Peterson v. City of Santa Rosa, 119 Cal. 387.

In *Gage v. Village of Wilmette*, 230 Ill. 428, it was urged that an ordinance providing for a sewer with an outlet in Lake Michigan in the Village of Wilmette was unreasonable, because contrary to the spirit of the Sanitary District Act. On page 434 the court said :

“If the contention of appellants be upheld on this point, then the Village of Wilmette, and all other municipalities of the State, along the lake shore could be restrained from sewerage. The result of such action might be an epidemic of disease in all of these towns. Before the court would be justified in taking this course it would have to be shown, beyond all doubt, that the public health clearly demanded such action.”

And in *Missouri v. Illinois*, 200 U. S. 496, the United States Supreme Court refused to enjoin the State of Illinois at the suit of Missouri from discharging the sewage of Chicago into the Mississippi River by means of the Drainage Canal, saying :

“Before this court ought to intervene, the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side.”

Were it not for the fact that the completion of the north shore channel of the Sanitary District has opened another avenue for the drainage of Evanston, we would not hesitate to report to your honorable body that upon the facts which may be presented in this case, the courts would not be inclined to enjoin the City of Evanston from discharging its sewage into Lake Michigan. What effect the opening of the Drainage Canal has upon the law of this case is difficult to determine. No such case has ever been presented to the Supreme Court in this State nor so far as our search has disclosed, has a similar question been passed upon in any of the courts of the United States. There is, however, dicta in this State, which together with the language of the act creating Sanitary Districts would indicate that the City of Evanston may be compelled to reverse its system of sewers so as to empty into the north shore channel of the Sanitary District.

The purpose of the act to create Sanitary Districts as contained in Section 1 thereof, was to provide a common outlet for two or more cities, towns or villages situated within one county for the drainage thereof, in such manner as will conduce to the preservation of the public health. (See Hurd's Revised Statutes, 1911, p. 349.)

While it has been repeatedly held that the act referred to in no way limits the power of control of the corporate authorities of cities within the limits of the Sanitary District over their system of sewers, in *City of Chicago v. Green*, 238 Ill. 254, our Supreme Court indicated that the control of these municipalities over their system of sewers was curtailed by the act referred to to the extent of the use of a common outlet. On page 264 the court said:

"A consideration of the various provisions of the Sanitary District Act of 1889 leads, it seems, irresistibly to the conclusion that this act was passed to furnish a common outlet for the sewage of the incorporated municipalities within the limits of the District, recognizing the existence of these municipalities without seeking to curtail their powers except in the one matter on a common outlet for their drainage and sewage."

In any event, the legislature of the State of Illinois has provided facilities for keeping the waters of Lake Michigan

pure for the use of the inhabitants of the City of Chicago and its neighboring communities. The duty of every person and public body within the limits of the Sanitary District of Chicago to refrain from polluting the waters of Lake Michigan as soon as a channel is completed by the Sanitary District bringing the drainage of any locality within its reach, is, in our opinion, just as mandatory as though the legislature had expressly provided against it.

We are satisfied that the Attorney General of the State of Illinois may bring suit to enjoin the City of Evanston and any other corporate body within the reach of the channels of the Sanitary District to restrain them from polluting the waters of Lake Michigan.

Whether the City of Chicago, may in its own name, apply for such an injunction, is not so clear. There is some authority affirming such right. The theory of the law is, that in the case of a public nuisance, suit must be brought on behalf of the people of the State of Illinois by the Attorney General. To entitle any individual or corporation to any legal remedy it must be shown that the individual or corporation has been specially injured, that is, that the individual or corporation, by reason of his or its proximity to the nuisance, has sustained a damage which is not sustained by the general public. If, however, a municipal corporation has been given the power to abate nuisance, the municipality, within its corporate limits stands in the same relation as the State. Indeed in *Gould v. Rochester*, 105 N. Y. 46, the very question was before the court and it was held that while the corporate authorities of a town could not enter the City of Rochester, to abate a nuisance an application may be made to abate the nuisance in a court of equity to enjoin the city from discharging its sewage upon the lands of the town in such manner as to create a nuisance.

Moreover, the City of Chicago owns a system of water works and supplies its inhabitants with water for compensation. In this respect, the city acts in its proprietary or private capacity and not as an agent of the People of the State, The property rights of the city in its water works is the same as that of a private individual or corporation. If it can be

shown that the act of the City of Evanston or of any other municipality, in discharging its sewage into Lake Michigan pollutes the waters thereof to such an extent as to damage the value of the water works of the City of Chicago, the city may bring suit for injunction. But, if the city applies for an injunction in a court of equity, we must be sure that our own municipality does not itself contribute in any way to the pollution of Lake Michigan.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 3, 1914.

HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

Your letter of the 2nd inst. in regard to the above entitled matter is received. To this letter you attach a petition addressed to you and signed by certain business firms or individuals having their offices on Randolph street, which petition alleges that the presence on the street of the women who are at present picketing the Henrici Restaurant leads to results which constitute a nuisance and annoyance to the signers of the petition.

Both your letter and the petition therein referred to are herewith returned to you.

In stating the facts regarding the condition complained of, you state that "these women make it their daily occupation to pass and repass the Henrici restaurant; that they make remarks for the purpose of being overheard by passers-by to the effect that there is a strike at that restaurant, and that by various acts they attract attention to this locality such as is calculated to draw curiosity seekers and other spectators to that place."

You do not say that any attempt has been made, by threats or otherwise, to intimidate the waitresses at the restaurant, or to coerce them to quit their work. Nor do you inti-

mate that there has been any serious annoyance of the patrons of the restaurant, or any effort to prevent them from continuing to patronize the place, other than the making of the statements you refer to in such a tone of voice as to be possibly overheard by patrons entering the place.

What may and what may not be lawfully done in the way of peaceable picketing, is a question about which courts and judges have differed widely. The subject is fully treated in an opinion rendered by this office, April 13, 1900, and signed by the then Corporation Counsel, Charles M. Walker (Opinions of the Corporation Counsel from April 5, 1897, to April 10, 1905, page 219).

Since this opinion was rendered, the case of *Barnes v. Typographical Union* has been decided by the Supreme Court of this state. This case is reported in 232 Ill., page 424, and was decided in February, 1908.

This case contains a fuller discussion of what may and may not be lawfully done in the way of peaceable picketing than any other case in the Illinois reports. In this case a very sweeping injunction against picketing, with or without intimidation, had been granted by Judge Holdom of the Superior Court. On appeal the decree was affirmed by the Appellate Court, and, on further appeal the judgment of the Appellate Court was affirmed by the Supreme Court. There was a strong dissenting opinion by two judges; but, of course, the opinion of the majority must be regarded as settling the law for this state.

The citation and examination of authorities for and against the right of peaceable picketing are so full in the opinion and dissenting opinion in this case that we do not deem it necessary to cite any further authority here. In this case the court says, pp. 435-436:

"It is next contended that if any injunction was authorized, the injunction granted was too broad in enjoining appellants from peaceful picketing of complainants' premises and from congregating about or near their places of business for the purpose of inducing or soliciting employes to leave the employment. It is contended that a peaceful picket line around a shop is entirely lawful. But this court has held otherwise in *Franklin Union*

v. *People, supra*, where endorsement was given to the doctrine of *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497. * * *

The very fact of establishing a picket line is evidence of an intention to annoy, embarrass and intimidate, whether physical violence is resorted to or not. There have been a few cases where it was held that picketing, by a labor union, of a place of business is not necessarily unlawful if the pickets are peaceful and well behaved, but if the watching and besetting of the workmen is carried to such a length as to constitute an annoyance to them or their employer it becomes unlawful. But manifestly that is not a safe rule and furnishes no fixed or certain standard of what is lawful or unlawful. Any picket line must result in annoyance both to the employer and the workmen, no matter what is said or done, and to say that the court is to determine by the degree of annoyance whether it shall be stopped or not would furnish no guide, but leave the question to the individual notions or bias of the particular judge. To picket the complainants' premises was in itself an act of intimidation and an unwarrantable interference with their rights. Pickets were, in fact, guilty of actual intimidation and threats, but if they had not been, the complainants were entitled to be protected from the annoyance."

This opinion goes about as far as any court has gone in the direction of affirming the right of an employer annoyed by peaceable picketing to have it stopped. But, even this opinion does not expressly hold or necessarily imply that the conduct of those who picket peaceably is criminal in such a sense as to justify arrest without warrant.

If these women have done and shall continue to do substantially nothing more than you intimate in your letter, we do not think you will be justified in arresting them. If it were shown that they annoyed the patrons of the restaurant by addressing them as they entered the place and by trying to dissuade them from entering, the case would be different.

The fact that curiosity seekers and loungers assemble on the sidewalk to watch these women would not, in itself, justify you in arresting them. The displays made in the windows of the State street stores during the holiday season are intended to attract, and at times do attract, large crowds upon the sidewalks; but it does not follow from this that you would

be justified in arresting the parties responsible for these displays.

The Appellate Court of this state has held that an ordinance prohibiting "the congregating of persons on the sidewalks of the city so as to obstruct free passage" did not justify the conviction of a member of the Salvation Army whose preaching and singing caused such a congregating upon the sidewalk. (*City of Bloomington v. Richardson*, 38 Ill. App. 60.)

If either the owners of Henrici's restaurant or the parties who signed the petition annexed to your letter, are seriously annoyed by the results of the operations of these women, they have their remedy. If they can bring the case within the authority of the case of *Barnes v. Typographical Union*, 232 Ill. 424, cited above, they can obtain an injunction by applying to the proper court; and, if the injunction is disobeyed, the parties disobeying it will subject themselves to punishment for contempt.

We advise you, therefore, that under existing circumstances, and so long as conditions do not become decidedly worse than you indicate in your letter, you will be doing your full duty if you continue to disperse crowds, when crowds assemble, so as to keep the streets and the sidewalk reasonably clear for traffic. We understand that the arrests which you have made so far were made in cases where a crowd had congregated on the sidewalk, and where the women arrested, forming part of such crowd, had been told to move on and had declined to do so. Such arrests were justifiable and such arrests may safely be made in the future under similar circumstances.

Yours respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 6, 1914.

HON. JAMES S. McINERNEY, City Prosecuting Attorney.

Dear Sir:

Your communication requesting an opinion as to whether Section 2720 of the Chicago vehicle license ordinance should be held to apply to vehicles from other towns or cities where there is no local vehicle tax ordinance, has been referred to me.

There is much conflict of authority on the question as to whether a vehicle license ordinance can be applied to non-residents of the city.

The case of *Pegg v. City of Columbus*, 80 Ohio St. 367 (27 L. R. A. n. e. 453) is a very well considered case on this subject and reviews the authorities from several states, including Illinois; there the charter and ordinance were both very similar to ours.

In that case the court held the ordinance unreasonable and invalid as applied to non-resident farmers and gardeners going to and fro from their homes to the city for the purpose of marketing their products and trading with the merchants in the city, or when visiting the city on business or pleasure.

In the case of *Harder's Storage Company v. Chicago*, 235 Ill. 58, and *Harder v. Chicago*, 235 Ill. 294, the validity of the Chicago wheel tax ordinance was sustained. In this case the direct question of whether or not the ordinance applied to non-residents driving into the City of Chicago was not raised. However, in the Harder Storage Company case the court held that the law is well settled that the owner of public vehicles on public streets and highways may be required to pay three different taxes and licenses, viz.: an *ad valorem* tax upon such vehicles as property, and may also be required to pay a tax upon the right or privilege of using such vehicles in his business—that is, an occupation tax; and in addition to these, he may be required to pay “a license tax upon the right or privilege of using vehicles upon the public streets and highways.”

In view of the fact that this office, relying upon the above mentioned opinions of our Supreme Court, has heretofore rendered several opinions that such ordinance should be applied to non-residents, I believe the city should be given, by its law

department, the benefit of any doubt until our courts have ruled on the question directly.

As to the question of "policy" to be pursued in enforcing the ordinance against some non-residents and not against others, I do not see that the law department can settle that matter. That would rather be a problem for the chief executive or the police department of the city.

Respectfully submitted,

WILLIAM J. NAUGHTON,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 9, 1914.

HON. LAWRENCE E. MCGANN, Commissioner of Public Works.

Dear Sir:

You referred to this department, at the suggestion of the City Architect, the question whether the bid of the corporation of which Mr. Jos. A. Holpuch is the head shall be considered along with other bids received for the construction of foundations for certain buildings of the new contagious disease hospital, also whether Mr. Holpuch, who is a member of the Board of Education, would be classed as an officer of the City of Chicago on that account.

There is nothing in the specifications submitted which precludes bids from a member of the Board of Education, and therefore the determination of both questions hinges on the construction of Section 7 of Article VI of the Cities and Villages Act, which reads as follows:

"Section 7. No officer shall be directly or indirectly interested in any contract, work or business of the city, or the sale of any article, the expense, price or consideration of which is paid from the treasury, or by any assessment levied by any act or ordinance; nor in the purchase of any real estate or other property belonging to the corporation, or which shall be sold for taxes or assessments, or by virtue of legal process at the suit of said corporation."

The question is not free from difficulty, owing to the fact

that the Supreme Court has decided in several cases that the Board of Education is, to some extent, a subordinate department of the municipal government. (*McGurn v. Board of Education*, 133 Ill. 122; *Brennan v. People*, 176 Ill. 620; *People v. City of Chicago*, 227 Ill. 445.) Nevertheless, the cases which so hold limit the application of this doctrine to certain purposes and have been distinguished in the opinion from which we quote below; and on the whole it seems quite clear that it was not intended by the legislature that the section quoted above should apply to members of the Board of Education so far as the contracts of the city for corporate purposes are concerned.

Under former charters the board of education was a branch of the city government and members of the board were officers of the city. But when the first comprehensive school act was passed in 1872 the board of education became a state agency and it has remained so ever since. (*Kinnare v. City of Chicago*, 171 Ill. 332.)

The Cities and Villages Act, also passed in 1872, which was afterwards adopted by the City of Chicago, was designed to meet the demand for a complete municipal charter and to apply to all municipalities that adopted it alike. Under this law no school directors in any other municipality of the state became officers of the city. Unless, therefore, there appears a reason for so regarding them on account of their being appointed by the mayor, there is no ground for classifying them as city officers in the City of Chicago. The provisions relating to city officers which appear in this charter act, if they are not supplemented by provisions of former charters that stand unrepealed, cannot be held to apply to school trustees in the City of Chicago any more than in other municipalities.

In the case of *People v. Healy*, 231 Ill. 629, the Supreme Court had before it a section of the Cities and Villages Act, which on its face applied to all officers of the city appointed by the mayor, and it held that while the legislature had seen fit to employ the powers and agencies of the city government in providing a system of free schools, the members of the Board of Education were not included within the term "any officer appointed by him" in the section in question. The court used the following language:

“* * * The Cities and Villages act dealt alone with the subject of local municipal government and provided for a mayor and other officers, who should perform the functions of municipal officers. * * * Article 2 was entitled ‘Of the mayor,’ and prescribed his powers and duties as the chief executive officer of the city. Section 7 of that article was as follows: The mayor shall have power to remove any officer appointed by him on any formal charge, whenever he shall be of the opinion that the interests of the city demand such removal; but he shall report the reasons for such removal to the council at its next regular meeting. * * *

“The power of appointment contained in the Cities and Villages act does not include members of the board of education, and although the general language would include every officer appointed by mayor under any other act, the question is whether the intention was to include school officers appointed under another and distinct act for fixed terms, and having duties entirely foreign to municipal government or the subject matter of the act in question. It is true that members of the board of education are officers, and it is also true that in the City of Chicago they are appointed by the mayor, by and with the consent of the city council. What the intention was must be determined from the rules of statutory construction and the aids to be found in other acts of the legislature.”

* * * * *

“(P. 640.) * * * In addition to all these reasons, the natural construction of the Cities and Villages act would confine the power of removal to officers appointed under that act, since the power is not, in terms, extended to officers appointed under other acts.”

People v. Healey, 231 Ill. 629, 636, 637, 640.

Since the Supreme Court has decided that so general a provision as that passed on in the above case does not apply to members of the board of education, there can be no doubt as to the construction it would place on the section now under consideration.

Aside from the above, there seems to be ample reason for the interpretation we place upon the provision in question when it is read in connection with the various sections of the school law, which prohibit school officers from being interested in contracts made by the boards of which they are mem-

bers, and which prohibit them from being interested in the sale, proceeds or profits of books, apparatus, furniture and supplies used in the schools. If it had been intended that they should also be precluded from bidding on city contracts, apt words covering this point would unquestionably have been included in the recently enacted school law.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 9, 1914.

HON. GEORGE B. YOUNG, M. D., Commissioner of Health.

Dear Sir:

You have asked to be informed whether the commissioner of health has authority to make a contract without special action of the city council for any commodity or service for which an appropriation was made in the annual budget.

This department has always regarded an appropriation for a specific purpose under the proper caption in the appropriation bill as sufficient authority to warrant the head of the department for which the same was appropriated to act without seeking additional or special authority for the particular thing. In other words, the head of a department has the right to make contracts in accordance with the city ordinances for all matters which are directly connected with the work of that department.

There is, however, one limitation on this general rule. The ordinances contemplate that contracts for public improvements should be let by the commissioner of public works, and specify in great detail the manner in which this should be done by him. Such being the case, we believe it is necessary to secure express council action in order to enable the head of any other department to do that particular work.

The statute (Cities and Villages Act, Article IX, Section 50) requires that any work or other public improvement when the expense thereof exceeds \$500, if constructed by contract,

shall be let to the lowest responsible bidder "in the manner prescribed by ordinance." The law department has construed this to mean that, while no special ordinance is required in each instance where a contract of this kind is let, there must be ordinances governing the letting of this kind of contract. Therefore, in pursuance of the statute, ordinances were enacted requiring that the commissioner of public works shall have charge of all public improvements constructed by the city (Section 2068), and setting forth fully the exact manner in which the same shall be let. (Sections 2102-2116.) These ordinances, taken in connection with a specific appropriation in the appropriation bill, constitute sufficient authority for the commissioner of public works to proceed on a public improvement without a special ordinance. This is not the case, however, with all heads of departments, although in some instances the ordinances have given such authority.

The commissioner of gas and electricity and the harbor and subway commission, by express provisions in the ordinances have like authority.

There is no such specific authority given to the commissioner of health. The only provision in the ordinances which relates to the letting of contracts in that department is Section 50 of the Chicago Code of 1911, which provides that all heads of departments may let contracts in the manner provided for the letting of contracts by the department of public works, but does not give express authority to let contracts for public improvements. The said section gives ample authority to the commissioner of health to make all contracts coming within the scope of his department with the exception of such contracts as come within the definition of the words "public improvements." Contracts for less than \$500 should be made by the business agent in the manner prescribed by ordinance, on requisitions from the commissioner of health, and special provision is made in Section 2517 for the purchase of medicines, etc., which the commissioner of health may buy without the formality of a requisition on the business agent.

We are of the opinion also that Section 50 of the Code when supported by an order of the city council specifically authorizing the commissioner of health to proceed with con-

struction work that has been provided for in the appropriation bill under the department of health, is sufficient authority without the passage of an ordinance specifying in detail the work to be done.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 10, 1914.

HON. RAY PALMER, Commissioner of Gas and Electricity.

Dear Sir:

We have your favor of the 16th ultimo, relative to lighting of boulevards in the various parks of the city. You state that the city has been lighting some of the boulevards, because, in many cases such boulevards were relinquished by the city after the installation of the lighting system, and the parks had no means available for furnishing the lighting thereof. You also state that you are desirous of arriving at a system whereby the city can be relieved of the expense of this lighting. You ask our opinion if there is any reason why the park boards cannot be compelled to assume the responsibility of this expense.

The various parks are separate municipal corporations and as such should be dealt with, so far as the maintenance and lighting of streets is concerned, by the city, in the same manner as if said parks were situated within an adjoining city.

West Pk. Commrs. v. Chicago, 152 Ill. 407.

Such being the fact, the city ought to enter into agreements, by written contracts, with the park boards requiring them to pay the city for the expense of the necessary lighting. The law of 1905 authorizing the city to sell surplus electricity is somewhat vague, but there is undoubtedly sufficient power given to the city by that act to enter into such contracts as you suggest.

We are of the opinion that such contracts, when prop-

erly drawn and signed, would be valid and binding, and that the same, when perfected, would be a proper solution of the present difficulties resulting from the situation you describe.

Very truly yours,

EDWARD J. QUEENY,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 11, 1914.

HON. RAY PALMER, Commissioner of Gas and Electricity.

Dear Sir:

We are in receipt of your communication of the 6th instant requesting an opinion in regard to whether under the terms of the ordinances now in force the Chicago Telephone Company is required to furnish service to all persons desiring the same within the limits of the City of Chicago regardless of the location at which the service is desired.

Section 6 of the Chicago Telephone Company's ordinance passed November 6, 1907, contains the following provision:

“Said Chicago Telephone Company during the term of this ordinance shall furnish upon demand telephone service of any of the classes or kinds mentioned in this section, in the City of Chicago, without discrimination, at the same rates, to all persons, firms and corporations who shall elect to take or use any of such classes or kinds of service, * * *”

The same language is used in Section 2 of the ordinance passed May 26, 1913, fixing the maximum rates of said company for a period of five years.

Said sections of the ordinances above referred to must be read in connection with the following provision in Section 5 of said ordinance of November 6, 1907:

“The said Chicago Telephone Company shall under the supervision of the Commissioner of Public Works, from time to time, lay out, locate, build, construct, equip, maintain and operate extensions of and additions to its system of wires, cables, electrical conductors, poles and conduits, and new exchanges in any part or parts of the City of Chicago for the purpose of supplying all or

any of the kinds of service which it is authorized to furnish under this ordinance, whenever in the judgment of the City Council it is necessary in order to meet any considerable demand of the public, or a portion thereof, for such kinds of service, or any of them, and whenever said City Council shall so require by ordinance or resolution passed not less than thirty (30) days after a request by said City Council, or some officer of the city designated by it, upon said Chicago Telephone Company, to do said work."

It is apparent from the last quotation that it was not the intention of the framers of the ordinance that the company should be obligated in any event and under all circumstances to furnish service to all persons desiring the same within the limits of the city regardless of location and irrespective of whether the company's lines had been extended into the territory in which the service was desired. The manifest intent was and is to give the city council power to require an extension of the company's service into new territory whenever, in the judgment of the city council, such extension is necessary in order to meet any considerable demand of the public or a portion thereof.

We are, therefore, of the opinion that the company is not under the duty of extending its service into all portions of the City of Chicago irrespective of local conditions but that it may be required to extend its service into any part of the city by action of the city council taken pursuant to and in compliance with the above quoted provision of Section 5 of the ordinance of November 6, 1907.

Yours truly,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MARCH 13, 1914.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

Section 7 of the act entitled "An Act to provide for the printing and distribution of ballots at public expense, and

for the nomination of candidates for public offices, to regulate the manner of holding elections, and to enforce the secrecy of the ballot," approved June 22, 1891, in force July 1, 1891 (commonly known as the "Australian Ballot Act") provides, among other things, as follows:

"PROVIDED, That certificates of nomination and nomination papers for the nomination of candidates for the offices in cities, villages and incorporated towns, and for town offices in counties under township organization shall be filed with the clerks of the towns, cities, villages and incorporated towns at least fifteen days previous to the day of such election: Provided, that in cities having a population of 500,000 or more that certificates of nomination and nomination papers for the nomination of candidates for the offices in such cities shall be filed with the city clerk of such cities at least twenty-five days previous to the day of such election." Hurd's Rev. Stat. of 1911, page 1050.

You have asked me verbally whether or not you are required to keep your office open after five o'clock P. M. of this date for the purpose of receiving any nomination papers or petitions which may perhaps be tendered to you for filing, this date being the twenty-fifth day prior to said election day.

Section 1661 of the Chicago Code of 1911 reads as follows:

"OFFICE HOURS. The offices of the respective city officers, except as hereinafter mentioned, shall be open every day except Sundays and such holidays as shall be observed by the general custom of the city, or by order of the proper authority, from nine o'clock in the forenoon to five o'clock in the afternoon. The office of the mayor shall be open at such hours as he shall prescribe. The office of treasurer shall be open during the usual banking hours observed by the banks throughout the city. The office of the city comptroller shall be open from nine o'clock in the forenoon to three o'clock in the afternoon."

From the foregoing it appears to me that you have a legal right to close your office at five o'clock, particularly in view of the fact that the city council has not directed that the same shall be kept open after the hour specified in the Code.

Any person, however, desiring to file nomination papers

would have a right to file the same up to twelve o'clock midnight tonight if he could do so. It is for you then to determine whether or not you desire to keep your office open until twelve o'clock midnight tonight for the purpose of permitting the filing of nomination papers or petitions. This is a matter for your own determination, as I am unable to find any law which requires the office to be kept open after the regular office hours.

Having entire control of this matter, if it should be your desire to have the office open for some designated portion of the evening after five o'clock and before twelve o'clock midnight, you can make that announcement and post a notice thereof at the main entrance to the office of the city clerk and then reopen the office at the designated hour and keep the same open until twelve o'clock. By so doing, you will be strictly within your legal rights and be extending an accommodation to persons who desire to file but whose petitions are not ready to be filed.

Yours very truly,

WM. H. SEXTON,
Corporation Counsel.

MARCH 16, 1914.

HON. JAMES DONAHOE, Chairman, Committee on Judiciary,
State Legislation, Elections and Rules.

Dear Sir:

At a recent meeting of your committee at which you discussed and recommended for passage an ordinance establishing a department of public welfare, you turned over a copy of same and requested an opinion from this department as to its validity.

As stated by the undersigned at the time of said meeting, the ordinance in question is drawn so that it appears to be good in form and not open to objection as to validity, but that the wording of same implies an attempt to venture upon certain activities which the city has no power to pursue, even though it may be most desirable to undertake the same. This was made clear by the discussion at the meeting of the committee.

The ordinance consists of five sections, of which the first, second and fifth relate to the creation of the department of public welfare, the appointment of its head and subordinate officers and assistants, and the time of taking effect. It is necessary, therefore, to consider only Sections 3 and 4.

Section 3 of the proposed ordinance creates the "Bureau of Employment." This bureau is required to operate the Municipal Lodging House for Men and the Municipal Lodging House for Women, and to "perform such duties in the collection of information relative to working conditions, wages, hours of labor and unemployment in the City of Chicago, and in the practical relief of unemployment, as may be required by the Commissioner of Public Welfare."

While the city has no express authority to establish a municipal lodging house, such an institution may be justified under the general police powers and the general health and welfare clauses of the charter. Extreme poverty and destitution, while not diseases, are somewhat akin to disease in the effect on the balance of the community.

They lead to uncleanly and insanitary conditions. Moreover, a homeless person unable to find shelter at night, becomes a menace to the community, since it requires great heroism and fortitude to remain honest and moral under such adverse circumstances. Consequently we have no hesitation in saying that the operation of municipal lodging houses comes within the legitimate exercise of the police powers of the city.

The establishing of a bureau which will collect information relating to working conditions, wages, hours of labor and unemployment may perhaps be justified on the same theory, although we are of the opinion that it is a severe stretch of the police powers of the municipality to include such work in its corporate activities, and the work would probably have to be limited somewhat in order to keep it within lawful corporate purposes.

It may be possible to accomplish something in the way of "practical relief of unemployment" without establishing an employment agency and by adhering to the enumerated

and implied powers of the municipality. If so, then even that branch of the duties of the bureau would be lawful.

Therefore it is plain that there is nothing in the phraseology of the section which would warrant an opinion that it would be invalid if enacted into law. But both the name of the bureau and the general language used indicate that it has for its purpose, among other things, the establishment of a free employment agency. This is borne out by the fact that the entire discussion before your committee on this branch of the subject was taken up with the consideration of that kind of institution, and it seemed to be taken for granted that the creation of the bureau meant the establishment of a free employment agency.

Not only has the city no authority to establish an employment agency, but it seems to be prohibited from doing so. The statute relating to free employment agencies, passed in 1903, contemplates that there shall be three such agencies under state supervision in this city. The statute relating to private employment agencies, passed in 1909, prohibits any one from carrying on an employment agency without procuring a license from the State Board of Commissioners of Labor, and no way is provided therein for a municipality to secure a license. The two acts read together, taken in connection with the fact that no authority has been granted to the city to run an employment agency, renders it useless to discuss the feasibility of such a project. This matter has several times come up for consideration in the city's law department, and we have uniformly held that there is no power in the municipality to run an employment agency.

Our opinion with regard to Section 3 is, therefore, that while it would be held valid if the work of the bureau created thereby was confined to things within the power of the city, it contemplates activities on the part of the city officers that are not authorized by law.

Section 4 of the proposed ordinance creates the "Bureau of Social Surveys" which is charged with the duty of collecting information and data relating to actual living conditions, facilities for recreation, causes of vagrancy, crime and poverty, and of recommending to the city council appropriate ordi-

nances or statutes for the practical betterment of such conditions.

This section, so far as its validity is concerned, stands on precisely the same footing as Section 3. The right of the city to collect information concerning matters of health cannot be questioned. There has been a bureau of vital statistics at all times since the present charter was adopted. The only question is whether, under its powers relating to the gathering of vital statistics and relating to inspection of sanitary and hygienic conditions and health matters generally, the city can undertake to make a study of sociological conditions, which is apparently the purpose of the work contemplated.

In other words, while we do not consider the name of the bureau as necessarily obnoxious to the validity of the section, yet if the bureau undertook to do what its name implies, that is to say, if it became a bureau for the study and dissemination of knowledge in the broad field of sociology, it would not be within the limits of the charter. The discussion before the committee indicated that, in the same manner as in the case of Section 3, it was contemplated by the supporters of the ordinance that much or all of the work of the county agent and other agencies of the state should be done by this bureau. We do not deem it necessary to go into particulars on this point, because it must be understood that whatever the duties of the bureau may be under the wording of the ordinance, it cannot undertake to provide subsistence for paupers or do other things which the law places into the care of state and county officers.

We have undertaken to define the limitations of the city's charter powers in respect to the matters involved in the ordinance at some length, in order that the city council may be fully advised that the proposed ordinance crowds the police powers of the city to the limit and points the way to overstepping those powers through the means of its provisions. We are necessarily compelled to rely on our own interpretation of the law and construction of the statutes, since authorities are lacking on the points that are in doubt, or at least the authorities which we would be compelled to cite would be applicable only to the general principles under consideration.

Much was said at the meeting of your committee in regard to the work done under a similar ordinance in Kansas City. On this point we beg to call your attention to the fact that under the so-called "Metropolitan" charter provided by the Missouri law, the cities of St. Louis and Kansas City have governments which control and include all the public functions of the territory occupied by the city. There is no distinct county and city government. Hence, to begin with, the Missouri city has all the powers now vested in the various governing bodies existing here, and besides, has added powers which the law in that state gives to large municipalities.

The limitations of the charter of this city are such that they do not permit the latitude that exists in Kansas City. If the ordinance in question is passed the work carried on under same, unless enlarged by future statutory enactments, will not be so broad in scope as is possible in the Missouri cities. Whether it will come within measurable distance of accomplishing what it is intended for may be determined by the members of the city council when they take into consideration the matters we have pointed out.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 18, 1914.

HON. A. A. BURGER, Secretary of the Board of Inspectors of
the House of Correction.

Dear Sir:

In your communication of recent date addressed to the corporation counsel, you asked for an opinion on two questions: First, whether the board of inspectors of the house of correction has authority to let a five years' contract or agreement for letting out labor at your institution without the formality of presenting or passing same through the city council. The second question was whether the board can recommend such a matter to the city comptroller and whether the

latter has the power to instruct the board to let such contract or agreement.

The two questions are so nearly allied to each other that we can answer both without dividing them.

It seems that the board of inspectors has not the authority to enter into a contract of this character without action on the part of the city council, and it is almost as certain that the city council itself would have no such power if it undertook to do this.

Under the Act of 1873, relating to the state reform school for juvenile offenders, the board of trustees of that institution was given power, among other things, to provide for the employment and education of its inmates. It undertook in pursuance of that power to make a contract with an individual for the use of the services of the inmates of that institution. The Supreme Court held that the board of trustees was a corporation with special and limited powers, that the contract made by it was void and that the statute did not confer upon them the power to make a contract of this character.

Clement v. Board of Trustees of State Reform School,
84 Ill. 311.

The law establishing the house of correction was passed in 1871. It did not expressly give the power to the board of inspectors of same to employ the inmates of the institution, and in this respect, the board of inspectors of the house of correction are more limited in their powers than were the board of trustees of the state reform school. Consequently, since it was held unlawful for the latter to make a contract of this character, *a fortiori* it follows that the board of inspectors of the house of correction cannot do so.

The act creating the house of correction unquestionably contemplated that the inmates should be employed. It required that the officer whose duty it was to receive the persons sentenced thereto should "safely keep and employ such person for the term mentioned in the warrant of commitment." (Sec. 10.) This is also made clear by the wording of Section 13 of that act which says that the expenses of maintaining any such house of correction "over and above all receipts for

the labor of persons confined therein," etc., shall be audited and paid by the legislative authority of the city. Consequently, there is no doubt that the inmates are to be employed, and the city council has expressly required this by Section 1497 of the Chicago Code of 1911, which makes it the duty of the superintendent to put each of the persons committed therein who is able to labor "to the work which they are respectively best able to do, not to exceed ten hours for each working day."

We are unable to find any statute which prescribes the class of work that the inmates of this institution should do, but we assume that their employment in the same manner and in the same lines of work as the employment of the inmates of the penitentiaries and reformatories of the state would be proper.

As stated above, the city council has not been given any authority to make contracts for the labor of the inmates of same, and there is little doubt but that the amendment of the constitution adopted in 1886 relating to prison labor, applies to this institution as well as to the penal institutions of the state. This amendment reads as follows:

"Hereafter it shall be unlawful for the commissioners of any penitentiary or other reformatory institution in the State of Illinois, to let out by contract to any person or persons, or corporations, the labor of any convict confined within said institution."

The only reason why there is any question as to the applicability of the above constitutional provision is because the word "convict" is used and it may be regarded as doubtful whether so harsh a name can be applied to a person confined in the house of correction, since he does not, through his imprisonment in same, lose any of his civil rights. On the other hand, the provision of the criminal code which authorizes the commitment of persons sentenced to the county jail in the house of correction, speaks of same as "convicts" (Criminal Code, Div. 14, Sec. 12), and the act establishing the house of correction makes provision for the imprisonment of persons sent there by the federal courts, who are usually regarded as convicts.

After giving due weight to the meaning of the word

“convict,” the conclusion is irresistible that the constitutional amendment was intended to cover such institutions as the house of correction. The authorities agree that the institution comes within the definition of the words “penitentiary or other reformatory institution.”

“A house of refuge and a house of correction are alike in the essential element that each is a quasi-penal institution, whose desideratum is the reformation rather than the punishment of the inmate.

A house of refuge is usually for the young; for juvenile offenders, exclusively. A house of correction, originally, was designed for petty evil-doers of all ages, and in the absence of any statutory provision to the contrary the age of a person committed is of no special importance. * * *

Every institution of a reformatory character, embraced within the meaning of the terms ‘houses of refuge and correction,’ is, in a legal sense, charitable and eleemosynary, so far as such terms may properly apply to a public corporation. In some states all such reformatory institutions are included in or united with the state charities. Sometimes they are specifically declared to be charitable corporations by the statutes which create them.

All such institutions are identical in spirit and purpose. The object of each is the reformation of the culprit and his restoration to society, as speedily as the general welfare will permit, prepared and equipped by reason of the training received while in confinement to lead a correct and useful life. But all such institutions are distinctly penal as well as reformatory in character.”

15 Am. & Eng. Enc. of Law, 2nd Ed., p. 777.

Webster defines the word “penitentiary” as follows:

“A place for penitence, or where penance is inflicted or offenses punished; especially, a house of correction in which offenders are confined for punishment and reformation, and compelled to labor; a work house.”

Additional authority for our view may be found in the following cases:

Hughes v. Daly, 49 Conn. 34.

McAndrews v. Hamilton Co., 105 Tenn. 399.

Aside from the exact definition of the words used, there appears no good reason for limiting the inhibition to the penal

institutions ordinarily called penitentiaries and reformatories. The fact that the words "or other" appear before the word "reformatory" and the fact that the word "institution" appears after it, makes it quite clear that the intention was not to confine it to the prison for juvenile offenders ordinarily known as a state reformatory. It was undoubtedly intended that it should include any penal institution where the inmates are employed at work which might compete with outside labor.

Therefore we are of the opinion that neither the board of inspectors of the house of correction nor the city council of the City of Chicago has power or authority to make such a contract as is contemplated for the output of prison labor.

Yours respectfully,

M. W. CAGNEY,

LEON HORNSTEIN,

Assistants Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MARCH 18, 1914.

HON. JOHN A. TRAEGER, City Comptroller.

Dear Sir:

You referred to us, in a letter of recent date, a copy of a communication received by you from the chairman of the committee on finance relating to the deposit of the money of the city in the banks, and the rates of interest derived therefrom. This letter asks whether it is possible to reopen the question of the rate of interest on city and school funds for the year 1914, and also calls attention to an order, introduced in the city council and now pending before the said committee, which proposes to amend Section 25 of the code by adding a provision that the advertisement for bids shall "call for proposals for sums of money to be deposited for periods of not less than ninety days."

The order directing the reopening of the question of the rate of interest to be paid on city and school funds for the year 1914 was introduced in the city council on January 5, 1914. That date was long after the designation of the deposi-

taries. It is, therefore, impossible to open up the question in regard to deposits for the year 1914. The statute governing the matter is Section 5 of Part 2 of Article XII of the Cities and Villages Act. This requires that the city comptroller shall advertise for bids not later than the first day of December and report same to the city council for its information and consideration not later than the fifteenth day of December, "to the end that an award or awards may be made upon such bids by the city council prior to the end of each fiscal year." The awards were duly made by the city council on December 17, 1913. Following the awards, the various depositaries named filed their bonds with the city comptroller. The entire transaction, upon the making of the awards and the acceptance on the part of the depositaries by filing their bonds, stands on precisely the same footing as any other contract duly awarded and entered into.

The city has contracted with these depositaries for the year 1914, and cannot now recede from its position without breaking faith with the institutions that were so designated as depositaries.

The question raised by the proposed amendment to the code mentioned above, which was introduced in the city council on December 22, 1913, is whether the city has the right to make time deposits in the various depositaries with a view to obtaining a higher rate of interest on its funds. You state in your letter that this calls for consideration from an administrative, rather than from a legal standpoint. While this is true, there is a question of law involved which is entirely distinct and separate from the question of safety.

You call attention to the fact that it might be urged that the deposit of money on time certificates would impair their safety. You also say that, under present conditions, there does not appear to be great danger of this, but that there may be occasion, some time in the future, when it would be advisable to promptly withdraw funds from one of the city depositaries, and if the money were deposited on time certificates your right to do so would be doubtful.

On this point we can say no more than that a municipal corporation is in no better position to demand the payment

of a certificate of deposit before it becomes due than a private party would be. Consequently, the question of safety is one that should be taken into consideration by the city council when it acts on the proposed amendment.

As stated above, however, there is a legal question involved, and it is at least doubtful whether the city would have a right, without further legislative enactment, to dispose of its funds by making time deposits.

Whether or not the deposit of public funds in a bank is to be regarded in the light of a loan, is a much mooted question on which the authorities are divided. If such deposits are loans, then there does not seem to be any good reason for drawing a distinction between a loan made by a deposit subject to draft at any time, and one subject to draft at some particular time in the future. Nevertheless, we are of the opinion that the statute does not contemplate that the city should loan out its money, and the statutory enactments which provide for the deposit of same in banking institutions seem to be framed on the theory that such money will be available just the same as if it remained in the vaults of the treasury.

Whenever the question of the deposit of public moneys has arisen, the courts have construed statutory provisions very strictly. While we cannot find a case where the precise question involved was raised, we call attention to several decisions which indicate how closely public authorities are to be held down to the exact letter of the law in the making of such deposits.

In the case of *First National Bank v. Peck*, 43 Kansas 643, the question as to the right of the board of county commissioners to designate a depository for a definite period of time arose. The law of Kansas authorized the deposit of moneys in banks to be designated by the board of county commissioners, and provided for the payment of interest, which was to be credited monthly to the account of the treasurer. It also provided that, before making deposits, the said board should take good and sufficient bonds, and that the bank of deposit should, on the 1st of each month, file a statement showing the amount of money on hand at the close of each

business day, and the amount of interest accrued thereon. The county commissioners undertook to make a contract for a period of three years. The court, in passing on the validity of this contract, used the following language:

“No express authority is found in the statute giving the county commissioners authority to designate a bank for any definite period of time, and they have only such powers in that respect as are given them by statute. The legislature does not require that the board shall ask for bids, nor that it shall designate the bank offering the highest rate of interest. The conditions imposed by the statute are that only responsible banks shall be designated, and that good and sufficient bonds shall be required. No limits as to the rate of interest nor as to the number of banks which a board may designate are prescribed. There is no provision that the board shall negotiate or enter into a contract of any kind with banks. It simply is required to exercise its judgment and discretion in the selection of one or more banks, and instead of negotiating with or receiving bids from them as to rates of interest, the statute expressly provides that such rate shall be paid as may be agreed or determined upon by the board. The county commissioners determine the rate of interest to be paid, the bond to be given, and then make the designation. If the bank designated refuses to accept the funds upon the required conditions, another designation is to be made, and if it accepts, the bond is given, the funds deposited, and interest is paid on the average daily balance of deposits for such length of time as the county board may keep the account or public funds in the bank. If it had been the purpose of the legislature that county commissioners might tie their hands and those of their successors and bind the county to retain the funds in a certain bank, through several changes in the membership of the board, or for any stated time, it would surely have made it clear in the statute enacted. The public interest will be best subserved by leaving the board free to change the depository whenever in the judgment of the commissioners the safety of the public moneys and the good of the county require such change. If the other policy was pursued, and an unsound depository should deny its unsoundness and refuse to surrender the funds, it would be necessary for the county to enter into a litigation with the bank to show that it was insecure and irresponsible; and meantime the interests of the county might be still further imperiled

and possibly sacrificed. Even if the bond given by the bank were ever so good, yet the funds would be tied up during the controversy and until an action on the bond was successfully prosecuted to judgment. If the controversy should be long continued the security might become greatly impaired and the public suffer a heavy loss. Whatever might be the result, the litigation and the locking up of the public funds would seriously embarrass the public business. All of these objections and risks were evidently foreseen by the legislature, and hence in providing for a deposit of the public funds no power was given to the board to designate a depository or to surrender the control of the public funds for a definite period of time. If the board might tie its hands and bind the county in this respect for one year or three years, why might it not under like circumstances extend the period to six, eight, or even ten years? This would be injurious to the public interest and therefore contrary to public policy, and in the absence of express legislative sanction, no such purpose should be inferred. The prime consideration is the safety of the public funds, and the manifest purpose of the law-makers was that the board should be wholly free to change the depository whenever it had reason to believe that the public interest would be best subserved by such a course."

We quote at length from the above decision because the reasoning seems to be sound. It is true that in many respects the case is entirely different than that presented by the proposed amendment under our statute, because in the present instance bids are provided for and a definite period is fixed, but we feel, nevertheless, that the opinion is directly in point as showing the strict construction that is placed on statutes of this character.

We also call attention to the case of *Van Vlissingen v. Board of County Commissioners*, 54 Minn. 555. In that case the treasurer, instead of taking a new bond, undertook to secure himself by taking over and holding certain securities belonging to the bank. The court held that this was improper and said, among other things:

"It will be observed by reference to the statutes mentioned that, as a condition precedent to the lawful deposit of the public funds by the county treasurer, a bond is to be executed and deposited with the treasurer, signed by five freeholders, and approved by the board

of county commissioners, and the bond is to be in an amount at least double the amount of the funds to be deposited with such bank. The bond is to run two years, but if the board of auditors, at any time after having made such designation, for good and sufficient cause, deem the security given insufficient, it may require a new bond, and if, in its opinion, the public interest requires it, may vacate, revoke or modify its designation of a depository in any way. The designation requires the exercise of the judgment of the board of auditors, and the acceptance and approval of the bond requires that of the board of commissioners, and the nature of the security is specifically pointed out by the statute. Its provisions are mandatory. It is thereby expressly 'made the duty of the officers designated and also of the board of county commissioners to comply with all the provisions of this act.' Laws 1881 (Ex. Sess.), Ch. 43, §1.

"The kind of security which a bank is required to give as a condition of receiving a deposit of funds from the county treasury must be of the character above described, and neither the board of auditors nor the board of commissioners have any discretion or authority under the statute to accept any other; and the deposit is not permitted to exceed one-half of the amount of the bond."

The question presented in *State ex rel. Irrigators' Bank v. Whipple*, 83 N. W. (Neb.) 921, may be said to be very nearly like the one before us. In that case the law provided that the county board should act on the proposition of each bank to become a depository of current funds of the county and approve its bond. The county board undertook to make a certain bank a preferred depository. That, in a certain sense, is what is proposed at present, except that in the present instance the preference relates more to the length of time for which money is to be deposited than to the amount of money. In passing upon the question, the court said:

"Nowhere does it appear in the act quoted, either from the words used, or any fair implication that may be drawn therefrom, that the board of county commissioners is authorized to make one bank a preferred depository, in which shall be kept all funds to the amount permitted under the bond by it given. In this respect, we think the county board clearly exceeded its authority; and its attempt to limit the depositing of funds in one of the banks mentioned, to such an amount as might be

held by the county treasurer in excess of the amount which might be deposited under the depository bond of the other bank, was an attempt to exercise power not conferred upon it by statute."

The statute controlling the deposit of funds under which the city council must act does not authorize in express terms a deposit for any fixed period, and, in view of the authorities we have examined, we do not believe that such power can be inferred from any words that appear in same.

That portion of Section 5 of the act which relates particularly to the point involved, reads as follows:

"It shall be the duty of the comptroller at least once in each year and not later than the first day of December of each year, to advertise for bids from all regularly established national and state banks doing business within the city, for interest upon the money of the city so to be deposited in such banks. Such bids shall be reported to the city council for its information and consideration not later than the fifteenth day of December of each year, to the end that an award or awards may be made upon such bids by the city council prior to the end of each fiscal year. Such awards shall be made to the highest and best responsible bidder or bidders. The city council shall have the power to reject all bids and to designate as many depositories as it deems necessary for the protection of the city's interests, and award bids accordingly. No bid shall be awarded to any financial institution other than a regularly organized state or national bank, and no moneys shall be deposited with any bank or such award be effective until such depository shall have delivered to the comptroller a bond to the city in such sum and with such sureties as the city council shall approve, conditioned in like manner as other official bonds given by public officials charged with the custody of money. The city council shall have power to pass all necessary ordinances to carry the foregoing provisions into effect and provide rules applicable thereto."

After full consideration of the subject, we are of the opinion that, aside from any question of administrative policy concerning the safety of the city's funds, it would be going beyond the powers delegated to the city council to loan its funds to the banks.

While the city is so situated that it cannot invest its

money in its own corporate bonds, and is compelled to let money lie idle in the depositaries which pay only a low rate of interest, there seems to be no good reason for assuming that the statute warrants the loaning out of money to banking institutions.

There are a number of special funds in the hands of the city treasurer which can be drawn on only under certain conditions, and the money in same could be deposited on time or even loaned out for a definite period without affecting the safety or availability of these funds when actually required. With proper legislative sanction this could be done, but up to the present time only very limited powers have been granted in this respect.

It is possible at the present time to use moneys in a sinking fund for the purchase of those particular bonds which the fund is being accumulated for. It is also possible to use moneys in special funds not immediately necessary for other purposes for the purchase of anticipation warrants.

These two provisions of the statutes, both enacted very recently, have resulted in saving the city a large amount of money. But they do not go nearly as far as may be ventured with perfect safety. The funds of the city which are not in use could be invested in the city's own bonds, which in turn could be sold to outside parties on short notice if necessary. In this way some of the special funds in question would earn four per cent. interest. Statutory provision could likewise be made for time deposits, and bids for interest on both demand and time deposits could be advertised for.

At the present time, however, the proposed amendment to Section 25 would be abortive, unless some scheme is devised whereby bids may be taken on time deposits with the privilege of immediate withdrawal. It may be possible that additional interest can be secured through the means of an understanding or agreement to the effect that when moneys are left in the depositary for a period of ninety days or longer there shall be a higher rate of interest. There would be nothing contrary to law in making such an agreement. Bids could be invited on the basis of a difference in interest rates in case the money is allowed to remain in the depositary a

certain length of time. If this will induce the banks to offer a higher rate to be paid only on condition that the money remains there for a long period and at a lower rate in case it is withdrawn sooner, it might be advisable to adopt that course, since it is entirely within the law.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 20, 1914.

WILLIAM H. LUTHARDT, Esq., Secretary, Board of Examiners
of Mason Contractors.

Dear Sir:

We are in receipt of your letter asking whether the word "structure" is intended to include the work of sewer builders within the terms of the ordinance passed January 16, 1914 (Council Journal, pages 3458-60), providing for the licensing and regulation of mason contractors and employing masons.

The definition of the words "masonry" and "mason work" in Section 1 of the ordinance is as follows:

"The words 'masonry' or 'mason work' as herein used shall include all work in brick, stone, concrete, terra cotta, tile and fireproofing, or any combination of these materials, as used in and about the construction of buildings or structures above or below the surface of the ground, with the exception of laying brick or concrete sidewalks and brick or concrete paving."

The word "structure" in its widest sense includes any production or piece of work artificially built up or composed of parts and joined together in some definite manner. (*Favro v. State*, 73 Am. St. Rep. 950; *Karasek v. Peier*, 50 L. R. A. 345.) As used in the ordinance, it cannot be given so broad an interpretation. But there seems to be no doubt that the city council intended to include such structures as sewers, whether in a building or underneath the street.

The word "structure" and the words "structure or other improvements," as used in the mechanics' lien laws of va-

rious states, has been held to include work of a character akin to sewers, such as aqueducts, canals, flumes, pipe lines, mines, etc.

4 P. & L. Dig. Laws Pa., 1897, Col. 1149, Sec. 1.

Nash v. Commonwealth, 174 Mass. 335.

Pacific Rolling Mill Co. v. Bear Valley Irr. Co., 120 Cal. 94.

It may be said that the word as used in the mechanics' lien laws is intended to be used in its broadest sense, also that it is not limited because it is not ordinarily coupled with other words so as to bring it within the doctrine of *ejusdem generis*, under which a general term is held to be limited in its meaning to the word or words preceding same.

Authorities are not lacking, however, to indicate that a broad interpretation is placed on the word even where there are other words designating a class or species preceding it in such laws. Thus, under a code giving a mechanics' lien upon a "building, improvement or structure," it was held that this included a mine or pit sunk within a mining claim. (*Helm v. Chapman*, 66 Cal. 291.) A statute giving a lien for labor or materials in the construction, alteration or repair of "any building, aqueduct or any other structure," was held to include poles and wires for the transmission of electricity. (*Forbes v. Willamette F. E. Co.*, 19 Ore. 61.) Other authorities might be cited to show that sewers are included within the provisions of mechanics' lien laws which use the word "structure" either alone or in connection with other words.

The word has also been given a broad definition in connection with other matters, as will be seen from the following authorities:

Under the statute providing that in the case of a total loss of a structure the insured must pay the full insured value of the property, it was held that a boiler and engine and apparatus pertaining thereto, contained in a building, constitute a structure.

Phoenix Ins. Co. v. Luce, 116 Ohio Cir. Ct. 483.

A reservoir was held to be a part of the main structure

in *Brush El. Wks. v. Warwick El. Mfg. Co.*, 4 Ohio N. P. Rep. 279.

A statute providing an action for injuries in case of defective roads and bridges when same is caused by a structure legally placed thereon by a railroad company, was held to include the railroad tracks, in *N. Y., N. H. and H. R. Co. v. City of New Haven*, 70 Conn. 390.

It will be seen from the above that the use of the word "structure" will ordinarily be held to include sewers unless there is some reason for excluding same under the doctrine of *ejusdem generis* or through the application of some other rule of limitation.

In the present instance, not only does it appear that there is no intention to exclude such structures as sewers from the provisions of the ordinance, but, by expressly excepting brick or concrete sidewalks and brick or concrete paving, it is made perfectly plain that the word "structure" was meant to include the work of sewer builders.

The writer called the attention of the committee which acted on the ordinance in question, at the time same was under consideration, to the fact that such a definition of the words "masonry" and "mason work" as was placed therein would include sewers. It cannot therefore be said that the committee acted without being fully informed as to the significance of the words used, and the city council presumably acted on the matter with the same purpose in view as the committee.

There seems to be no doubt therefore concerning the question that you ask. The ordinance was intended to cover the work of sewer builders underneath buildings and underneath the streets, as well as work on buildings above and below ground.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 20, 1914.

HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

We are in receipt of your communication of the 16th instant in which you request an opinion on the following points:

1. Whether in the case of an application for a license to keep a saloon at 4050 South State street, which location is within the territory comprised in the former Town of Lake, South State street being the eastern boundary of said former Town of Lake, legal voters who reside east of South State street and outside the limits of the former Town of Lake, but within one-eighth of a mile from the place where the saloon is to be kept, are qualified to sign the petition for the saloon and are to be counted in determining the number of legal voters who must sign the petition in order to meet the ordinance requirement of a majority of the legal voters.

The Town of Lake was annexed to the City of Chicago June 29, 1889. By virtue of the provisions of Section 18 of the Annexation Act (Hurd's R. S. 1911, p. 323), the liquor ordinances of the former Town of Lake continued in full force and effect in the territory in question, notwithstanding its annexation to Chicago.

The liquor ordinance of the Town of Lake which was in effect at the time of its annexation and which still continues in effect, provided that all applications for license to keep a saloon should be, among other things,

"accompanied by a petition of a majority of the legal voters of the town residing within one-eighth of a mile from the place where such saloon is to be kept."

The ordinance expressly limited the requirement to a majority of the legal voters "of the town" residing within one-eighth of a mile. The phrase, "legal voters of the town" manifestly refers to legal voters of the Town of Lake and did not refer to or include legal voters outside of the boundaries of the Town of Lake.

We are therefore of the opinion that only such legal voters as reside within the boundaries of the former Town of Lake and also reside within one-eighth of a mile from the

place where the saloon is to be kept are qualified to sign petitions or are to be counted in determining the number of legal voters who must sign the petition in order to meet the ordinance requirement of a majority of the legal voters.

The foregoing also answers your inquiry in regard to the saloon located at the southwest corner of South State street and Thirty-ninth street.

2. You also inquire as to what signatures are required upon a petition to keep a saloon at the southeast corner of South State and Thirty-ninth streets which is in the former Town of Hyde Park, Thirty-ninth street being the northern boundary and South State street the western boundary of Hyde Park.

Hyde Park also was annexed to the City of Chicago June 29, 1889. The liquor ordinance in force in Hyde Park at the time of its annexation and which still continues in force, provides that any person desiring to obtain a license to keep a saloon, shall, among other things, present an application which

“shall be signed by a majority of the property owners, according to frontage, on both sides of the street in the block in which such dramshop is to be kept and shall also be signed by a majority of the *bona fide* householders and persons or firms living in, or doing business on each side of the street in the block upon which such dramshop shall have its main entrance.”

The Supreme Court of this state held in the case of *Harrison v. The People*, 195 Ill. 466, that the word “block” as used in the ordinance just quoted in connection with the signature of property owners was synonymous with the word “square” and means the territory bounded by four streets.

It will be observed that in addition to the signatures of property owners, the ordinance also requires that the application for the license must be signed by a majority of the *bona fide* householders and persons or firms living in or doing business on each side of the street in the block on which such dramshop shall have its main entrance, that is, on that portion of the street which lies between the two nearest intersecting streets. If the main entrance to the saloon is diagonally across the street corner, then the entrance is as much on one of the

streets as on the other and in such case the application must bear the signatures of a majority of the *bona fide* householders and persons or firms living in or doing business on each side of each of said streets (lying between the two nearest intersecting streets) upon which the saloon has its main entrance.

Hoyt v. McLaughlin, 250 Ill. 442.

Your communication raises the question whether in the case of an application for a saloon to be kept at the southeast corner of South State and Thirty-ninth streets property owners owning property and householders residing on the west side of South State street and the north side of Thirty-ninth street are qualified to sign the application.

Inasmuch as said streets mark the western and northern boundaries of the former Town of Hyde Park, property and places of residence on the west and north sides of said streets respectively, would lie outside of the limits of the former Town of Hyde Park.

Ordinances of a municipality are presumably passed for the benefit and protection of its own inhabitants and when the operation of an ordinance in respect to licensing dramshops is made dependent upon the wishes of persons owning property or residing in the neighborhood where the dramshop is to be kept, it cannot be presumed, without a clear expression of such intention, that the framers of the ordinance intended that persons owning property or residing outside of the limits of the municipality should have any voice in determining whether a dramshop should be established within the municipality.

If persons owning property or residing on the west side of South State street or the north side of Thirty-ninth street, which is outside of the boundaries of Hyde Park, are qualified to sign a petition for a saloon to be located at the southeast corner of South State and Thirty-ninth streets, which is within Hyde Park, then it would be possible, under certain circumstances, for such persons owning property or residing outside of Hyde Park to dictate and control (perhaps directly contrary to the wishes of the inhabitants of Hyde Park owning property and residing in the block where the saloon is to be

kept) in respect to whether a saloon should or should not be established within the Town of Hyde Park. We do not think that such intent or meaning can be gatnered from or read into the ordinance.

We are therefore of the opinion that in cases where only one side of a street or streets bounding a block in which a saloon is to be kept, is within the boundaries of the former Town of Hyde Park, only persons owning property and *bona fide* householders and persons or firms living or doing business on that side of the street or streets which is within the boundaries of the former Town of Hyde Park, are qualified to sign applications for a license to keep a saloon within the Town of Hyde Park; and also, that the property frontage on that side of the street or streets which lies outside of Hyde Park should not be included in computing the total property frontage of the block nor should the *bona fide* householders or persons or firms living or doing business on that side of the street or streets which lies outside of Hyde Park, be counted or included in determining the number of householders, persons and firms required to sign the application in order to have the majority required by the ordinance.

Yours truly,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 23, 1914.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

In compliance with the request of your committee for an opinion concerning the right of a passenger riding on the street car lines within the city to obtain a transfer or transfers whereby he is permitted for a single fare to ride from a given point to another point, and in so doing reverse his direction of travel from the direction in which he starts to travel when no other means of street car transportation is available

whereby he can go from one point to the other, we advise you as follows:

The question under consideration is controlled by the provision of Section 11 of the ordinance of February 11, 1907, the material portions of which are as follows:

“UNIVERSAL TRANSFERS.

“Every such passenger may demand and upon such demand shall receive from the conductor of the car upon which he first takes passage, or from some authorized agent of the company, a transfer. Said transfer shall entitle such passenger to ride upon any other line of said street railway system owned, leased or operated by the company or any other line of street railway operated by any other corporation from which the company is by this ordinance obligated to accept transfers, which connects with, crosses, intersects or comes within a distance of two hundred (200) feet of the line of said street railway upon which the passenger first took passage and paid his fare. But this obligation shall not apply to any connecting point in the south division of the City of Chicago north of Twelfth street, except that upon the completion and operation of subways under the provisions of this ordinance, transfers shall be given at all points within said subways where lines of railway of *any such corporation or corporations* connect with each other.

The payment of a single fare shall not entitle a passenger to reverse his general direction of travel. If necessary to enable a passenger to reach his destination the conductor or other authorized agent of the company shall issue without additional charge, a transfer upon a transfer, the same as required upon payment of a cash fare; the intention being that for a single fare the company shall carry any passenger for a single continuous ride over any of the said lines of street railway owned, operated or leased by it, within the limits of the said city, so long as such ride is in the same general direction, although some of the lines necessary to be used by such passenger in arriving at his destination intersect or cross one another, or do not conform to such direction.”

It will first be observed that the council has taken occasion to designate the subject matter of that portion of the section from which we have just quoted “Universal Transfers,” a fact to which no little significance should be attached. This

title, in our judgment, amounts to a delusion and a snare if the subject matter which follows it is to be given the narrow and circumscribed meaning contended for by the street railways.

We find the term "universal" defined in Words and Phrases, Vol. 8, as follows:

" 'Universal' is said by Webster to be that which pertains to all, without exception. *Koen v. State*, 53 N. W. 595, 596; 35 Neb. 676; 17 L. R. A. 821."

It will be observed that the portion of the section from which we have quoted begins by providing, without limitation, that every passenger shall be entitled to demand and receive a transfer. Then the section proceeds to prescribe what the transfer shall entitle the passenger to, which is, to ride upon any other line of street railway owned, leased or operated by the company, etc., "which connects with, crosses, intersects or comes within a distance of two hundred (200) feet of the line of said street railway upon which the passenger first took passage and paid his fare." Now for the first time we encounter a limitation, and the language creating that limitation is "the payment of a single fare shall not entitle a passenger to reverse his general direction of travel."

It becomes material to pause at this point and determine the meaning of the expression "his general direction of travel," because the meaning of the section in question depends to a very great extent upon the definition which is to be given to the words in question.

The general expression, the meaning of which we are required to determine, is "general direction of travel," but before we seek to determine that meaning it becomes essential to determine whose general direction of travel is referred to. The key to this inquiry is the word "his," and it becomes apparent then that "his" refers to the antecedent noun "passenger." So that the question then to be determined is, the meaning of the expression the passenger's "general direction of travel."

It is our opinion that a passenger's general direction of travel is that direction in which he would naturally travel during the greater portion of his journey if there were no

impediments to taking a direct route, which could probably be determined in another way by drawing a straight line from the point indicating the beginning of his journey to a point indicating the termination of his journey, and then concluding which two of the four points of the compass that line most nearly pertains to.

We can perhaps best illustrate our idea by a concrete illustration, and for this purpose we take the case of a passenger who starts at Ellis avenue and 43rd street, and who desires to ride thence to Ellis avenue and 63rd street. He boards a car going west at 43rd and Ellis, pays a five-cent fare and obtains a transfer entitling him to ride southward on Cottage Grove. He leaves the car at 43rd and Cottage Grove and takes a Cottage Grove car going south; he hands his transfer to the conductor of that car and obtains from the conductor another transfer entitling him to ride eastward on a 63rd street car. When he reaches 63rd street he leaves the Cottage Grove car, boards a 63rd street car going east and gives the conductor of that car his second transfer. He then rides east on the 63rd street car to Ellis avenue, where he terminates his journey. If we recall the distance from Ellis avenue to Cottage Grove avenue correctly, this hypothetical passenger has then ridden two blocks in a westerly direction, twenty blocks in a southerly direction and two blocks in an easterly direction. Under these circumstances, how can it be said that the general direction of travel of this passenger was other than south?

If this passenger were fond of walking, and the weather were pleasant, and he had sufficient time at his disposal, and he were to indulge his fondness for walking or if he were to travel in a vehicle which could be propelled without the use of a track, his only direction of travel would have been south, but for reasons best known to himself he seeks to reach his destination by the nearest street railway route, and therefore travels as we have above indicated.

Webster defines "general" to mean: "Common to many or the greatest number; widely spread; prevalent; extensive, though not universal." If we may adopt Mr. Webster's suggestion as to the meaning of this word "general," we are,

therefore, forced to the conclusion that inasmuch as our hypothetical passenger traveled for the greater portion of his journey in a southern direction, and inasmuch as his southern direction of travel tended chiefly to bring him to his destination—all other directions of travel being incidental only and being employed by him by force of circumstances and not because they in themselves tended to take him to his destination—his general direction of travel was south.

Having thus determined this passenger's general direction, we are forced to conclude that after having ridden westwardly on 43rd street to Cottage Grove and southwardly on Cottage Grove to 63rd street, he could then ride either east or west on 63rd street without reversing his general direction—south.

We are not oblivious to the fact that eminent counsel, representing the street railway interests, has submitted a written opinion in which he holds that the general direction of travel of a passenger asking for a transfer is determined by the direction in which he is going when he pays his cash fare, and that he is not entitled to reverse that direction without paying an additional fare, but with this opinion we are impelled to differ.

Nor are we unmindful of the fact that the language of Section 11 now under consideration is not free from ambiguity, and while we are quite confident that the language under consideration should be construed as we have above indicated, nevertheless, if two possible constructions are open, we believe the law to be well established that the construction which is most favorable to the public should be adopted.

Blocki v. People, 220 Ill. 444;

Mills v. County, 7 Ill. 197.

We are convinced, however, that other language found in the section in question adds additional support to our conclusions. As has been noted, part of Section 11 provides:

“If necessary to enable a passenger to reach his destination the conductor or other authorized agent of the company shall issue without additional charge a transfer upon a transfer, the same as required upon payment of a cash fare; the intention being that for a single fare the company shall carry any passenger for a single con-

tinuous ride over any of the said lines of street railway owned, operated or leased by it, within the limits of the said city."

If the language of this sentence were to end here, it is our opinion that the meaning of that portion of Section 11 now under consideration would not admit of the slightest doubt. But the sentence now under consideration continues thus:

"so long as such ride is in the same general direction, although some of the lines necessary to be used by such passenger in arriving at his destination intersect or cross one another, or do not conform to such direction."

We construe the language last quoted to mean that the ride of a passenger on a single fare need not be in the same general direction if some of the lines necessary to be used by him in arriving at his destination (1) intersect, (2) cross one another, or (3) do not conform to such direction.

Clearly, a passenger is not required to travel in the same direction all of the time in order to ride for a single fare. Concededly, he may for a single fare, transfer onto a car on a line running at right angles to the line on which his travel initiated. But the words, "or do not conform to such direction," used in connection with the preceding portion of the sentence, of which they are a part, while not having a meaning that is perfectly clear, should, we believe, under all the circumstances, be taken to mean that where a passenger's ride is in a certain general direction he is entitled to a transfer which will entitle him to ride in a direction the reverse of his general direction, in exceptional instances where there are no other means of street-car travel that would enable him to reach his destination.

Of course, we should not lose sight of the fact that two purposes are sought to be accomplished by the language now under consideration, one of which is, to permit a passenger for a single fare to travel over any lines owned or operated by any company by the shortest route in order to go from one point to another point. The other purpose sought to be accomplished by this section is, to protect the company against a passenger going from one point to another, and, by a system

of transfers, returning to or near his starting point, upon the payment of a single fare.

Ever since the ordinance of February 11, 1907, has been operative it has been so acted upon by the companies and the public having occasion to use those lines so that such action amounts to a contemporaneous construction of the section in question, which is in keeping with the views we have expressed herein.

We therefore conclude that the general direction of a passenger's travel is the direction of all directions traveled which would, in the absence of impediments causing him to take a circuitous route, have the greatest tendency to bring him to his destination.

We further conclude that a passenger may, in exceptional instances, and for a single fare, ride in a direction the reverse of his general direction, where there are no other means of street car travel that would enable him to reach his destination, so long as he is not thereby enabled to make any considerable progress, in such reverse direction, toward the point from which he started.

Yours respectfully,

CHARLES M. HAFT,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MARCH 27, 1914.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

I have before me your communication to this department and also the letter of Barrow, Wade, Guthrie & Company, certified public accountants, which correspondence involves the question as to the scope of the audit contemplated under the provisions of Section 29 of an ordinance of February 11, 1907. (The firm of accountants in their communication refer to an ordinance of February 1, 1907, which I assume is an error, and to mean the ordinance passed on the date above men-

tioned.) The section in question provides, in so far as is material for the decision of this matter, as follows:

“SECTION 29. The company, so long as it continues to operate any of the said street railways under this ordinance, and on or before the tenth day of April in each year, shall *prepare and file with the city comptroller of said city annual reports for the preceding year ending on the 31st day of January.*

Such reports shall be in writing verified by the affidavit of the auditor of the company, *setting forth in reasonable detail according to forms* prescribed by said comptroller, the character and amount of business done by the company for the year immediately preceding such report and the amount of receipts from and the expenses of conducting the said business (and the said city comptroller or accountants authorized by him, under the direction of the Mayor or City Council of said city, shall have the right at all reasonable times to examine all the books, vouchers and records of the receipts and expenditures of the company, for the purpose of ascertaining the accuracy of the reports herein required and the rights of the said city under this ordinance.) The board of supervising engineers shall have the power to prescribe the form and manner in which the books and accounts of the company shall be kept subject to the approval of the city comptroller. *There shall be also an annual audit of the accounts of the company covering all receipts and expenditures for the year ending on the thirty-first day of January next preceding, and a formal written report by public accountants selected by the city and the company, the expenses of such audit and report to be paid out of the gross receipts of the company as an operating expense.*”

You will first note that there are several reports contemplated under this section:

(a) One to be filed on or before the tenth day of April in each year with the city comptroller annually for the preceding year;

(b) Such ancillary report as the comptroller may deem necessary under the direction of the mayor or the city council for the purpose of which the right of visitation to and inspection of all books, vouchers and records of the receipts and expenditures of the company are permitted. This report (b) may be made upon investigation of the comptroller either for

the purpose of verification of the report (a), or for the protection of the rights of the city under the ordinance.

(c) In addition to the foregoing there is provided for another report which shall comprise an annual audit of the accounts of the company of all receipts and expenditures for the year preceding and "a formal written report by the public accountants selected by the city and the company, the expenses of such audit and report to be paid out of the gross receipts of the company * * *."

The language above quoted contemplates evidently not only an audit but a formal written report. The scope of this report is in no wise limited by anything in this section. The limits of the audit are confined to all receipts and expenditures of the preceding year.

If in scrutinizing and investigating the receipts and expenditures, facts are discovered warranting criticism upon the propriety of the distribution of expenses or other matters connected with the financial affairs of the companies as reflected by their books and records, I am of the opinion that such report may properly include these matters.

The matters which shall be submitted to an audit are limited to receipts and expenditures, but the report is not so limited and may include such recommendation or expression of opinion with reference to receipts and expenditures as the firm of accountants may deem proper to make under the circumstances.

In your letter you ask if the firm of accountants is "authorized, empowered and expected" to report on the propriety of the distribution of the expenditures and other matters connected with the financial affairs of the companies? Answering this inquiry categorically, I will say that they are authorized and empowered to so report if they see fit, but as to whether they are "expected" so to do or not I cannot venture an opinion.

You then say that "it would seem to us that without this examination to pass on the correctness of the charges, the audit would be of no value." The examination, as I have above stated, is limited by the ordinance to making an annual audit of all receipts and expenditures for the preceding year.

If in the examination connected with making this audit sufficient information is divulged to the accountants to make a report on the correctness of charges, I am of the opinion that they may so report.

While not strictly embraced within the limits of your inquiry, I assume that you wish to know what will be the position of the comptroller in the event that the report in question shows incorrect or improper methods of distribution of expenditures, etc., and to anticipate your question I will say that should the scope of the accountants, as hereinabove delimited, be insufficient to afford them opportunity for making a full report on any impropriety which they may find in accounting, then your remedy is clear under this section of the ordinance, which empowers you, or accountants authorized by you under the direction of the mayor or city council, to examine "all the books, vouchers and records of the receipts and expenditures of the company for the purpose of ascertaining the accuracy of the reports * * * and the rights of the city under this ordinance."

I may call your attention to the provisions of Sections 16, 17, 18 and 19 of the Chicago City Railway Ordinance of 1907, which have to do with supervision and inspection of expenditures of the company by the board of supervising engineers, and I would suggest upon the first inkling of any impropriety in the accounts or methods of accounting on the part of the street railways, that formal notification thereof be served at once upon said board, accompanied by peremptory demand on your part that any abuses in the system of accounting found to exist be called to the attention of the companies by the board of supervising engineers with a view to their immediate change and improvement.

Your communication also states that it is "your understanding that a report on the correctness of the charges made by the companies has been made by the auditors in this annual report during previous years." This fact might go far to establishing a principle of practical and contemporaneous construction by the parties to the contract in favor of the system of reports heretofore made, but without a more detailed statement of the nature of these reports, the length of time during

which they have been made and other facts not contained in your communication, I am unable at present to state how far the continuance of this practice would have a legal bearing on the question.

Yours very respectfully,
 JOHN W. BECKWITH,
First Assistant Corporation Counsel.

Approved:
 WM. H. SEXTON,
Corporation Counsel.

MARCH 28, 1914.

HON. L. D. SITTS, Chairman, Committee on Gas, Oil and
 Electric Light.

Dear Sir:

We are in receipt of your communication requesting a statement on the present status of the above mentioned suit and the policy of this department with reference to the future prosecution of said suit.

The ordinance in question was passed July 17, 1911, and went into effect August 10, 1911. The ordinance fixed the price of gas at 75c for the first year, 70c for the second and third years and 68c for the fourth and fifth years for each one thousand cubic feet of gas, with 5c additional for each one thousand cubic feet of gas if the consumer failed to pay the bill therefor within ten days after its presentation.

On July 31, 1911, the People's Gas Light and Coke Company filed in the Circuit Court of Cook County its petition to review and determine rates for gas prescribed in and by the ordinance passed July 17, 1911.

On August 2, 1911, an order was entered by Judge Gibbons in the matter of said petition of the gas company, ordering that until final action by the court the gas company should charge not to exceed 80c per thousand cubic feet, provided that it might charge an additional 10c per thousand cubic feet if the consumer failed to pay therefor within ten days after presentation of bill. Said order further enjoined the City of Chicago from in any way enforcing said ordinance of July

17, 1911, or any of the provisions thereof against said gas company.

On October 31, 1911, notwithstanding said injunction against enforcing said ordinance, we filed, in the Circuit Court of Cook County, a bill of complaint in the name of the city against the People's Gas Light and Coke Company, praying that upon the final hearing thereof said gas company should be enjoined from charging more than the maximum rates for gas fixed in the ordinance of July 17, 1911, and from in any manner violating said ordinance; and also praying that upon the filing of the bill an order be entered enjoining the gas company from charging more than 80c per thousand cubic feet of gas until the further order of the court and requiring the gas company to turn over to some person to be named by the court all moneys that should be collected by the gas company from consumers in the City of Chicago in excess of the maximum rates prescribed in said ordinance of July 17, 1911, the same to be held by such person to be named by the court subject to the further order of the court.

On November 14, 1911, the demurrer which the gas company had filed to the city's bill of complaint was overruled.

On December 5, 1911, after an extended hearing before Judge Kickham Scanlan, a temporary injunction order was entered by him enjoining the gas company, until the further order of the court, from charging more than 80c per thousand cubic feet of gas with an additional 10c per thousand cubic feet in case of consumer's failure to pay the bill within ten days, and ordering the gas company, until the further order of the court, to deposit with the Central Trust Company of Illinois, as trustee, all moneys collected or received by the gas company from consumers of gas in excess of the maximum rates prescribed in the said ordinance of July 17, 1911.

The gas company perfected an appeal to the Appellate Court from said injunction order entered by Judge Scanlan, and after hearing on briefs and oral argument, the Appellate Court, on April 25, 1912, handed down an opinion and entered an order reversing said injunction order.

On May 15, 1912, the gas company filed its amended answer to the city's bill of complaint as amended.

Between the time of the entry of the above mentioned injunction order on December 5, 1911, and the filing of the gas company's amended answer to the city's bill on May 15, 1912, various proceedings were had in said suit which it is not necessary to specify in detail.

On November 14, 1911, the gas company filed its bill against the city in the United States District Court for the Northern District of Illinois, Eastern Division, to enjoin the enforcement of said gas rate ordinance of July 17, 1911, and praying for a temporary and permanent injunction, etc. After a full hearing before Judge Kohlsaatt, the gas company's motion for a preliminary injunction was denied and various other proceedings were had in this suit. After exceptions filed by us on behalf of the city to the gas company's bill had been heard and overruled, we filed a general demurrer to the gas company's bill, which demurrer has not yet been disposed of.

On February 23, 1912, while the proceedings above outlined in said above mentioned suits were in progress, the Supreme Court of Illinois rendered an opinion in the case of *Neiberger v. McCullough*, 253 Ill. 312, in which it construed Section 13 of Article IV of the Illinois constitution, requiring among other things, that a bill and all amendments thereto shall be printed before a vote is taken on its final passage. The Supreme Court held (disapproving the contrary holding in the case of *Supervisors v. People*, 25 Ill. 181) that such requirement is one which the journals of the house and senate must show was complied with and that it cannot be presumed from the mere silence of the journal that such requirement was complied with.

The ruling in the Neiberger case placed in jeopardy many important acts passed by the legislature prior thereto, among them being the Municipal Court Act passed in 1905 and the Appellate Court Act passed in 1877.

After the opinion in the Neiberger case was handed down, the gas company on May 15, 1912, filed its above mentioned amended answer to the city's bill of complaint in the State Circuit Court suit. In said amended answer the gas company, taking advantage of said decision in the Neiberger

case, set up, among other things, that the gas rate act of May 18, 1905, had not been passed in the mode prescribed by the constitution and that said act was therefore unconstitutional and void and that aside from said act the city was without power to fix the price of gas, and that the ordinance of July 17, 1911, was invalid and void.

Immediately after the decision in the Neiberger case we made a careful examination of the journals of both houses of the legislature pertaining to the gas rate act of 1905. Inasmuch as it did not affirmatively appear from the journal of the house that certain amendments made by the senate to the bill as first passed by the house had been printed by the house before the vote was taken on the final passage of the bill by the house, there was the gravest doubt as to whether the bill had been passed in the mode prescribed by the constitution under the construction apparently placed by the Supreme Court in the Neiberger case on the above mentioned provisions of the constitution.

The city's power to prescribe rates for gas rested solely on the gas rate act of May 18, 1905, and it is apparent that if this act should be held to be unconstitutional and void on account of its not having been passed in the mode prescribed by the constitution, the city's suit to enforce the ordinance fixing rates for gas would necessarily fail.

In the absence of an agreement between the parties to the suit no method was available for forcing a decision of the court upon the question of the constitutionality of the gas rate act, as a question separate and distinct from the other issues in the case. A decision on this point could only be had at the conclusion of the trial of the case upon all of the issues in the case, including the question as to the reasonableness of the rates prescribed in the ordinance.

Inasmuch as a trial of all the issues in the case would have entailed a very large expenditure of public money for expert witnesses and other items, this department in view of the uncertainty that existed under the ruling in the Neiberger case as to the constitutionality of the gas rate act, was unwilling to proceed with the trial of the case and to expend the public's money therefor until the question of the consti-

tutionality of that act had been definitely settled by the courts.

In these circumstances this department endeavored (but without success) to arrange a program with the attorneys for the gas company which would induce a decision on the point of the unconstitutionality of the gas rate act without a trial of the other issues in the case.

Having been unsuccessful in our effort to have the point referred to determined in the manner above indicated, we sought through the channel of certain other suits (wherein the question could be presented in a short time and without any considerable expense) to induce the Supreme Court to recede from or modify the position taken by it on the point in question in the *Neiberger* case, or to explain or clarify the opinion in that case so that it might be definitely known whether the manner in which the gas rate act had been passed was or was not a sufficient compliance with the constitutional requirements in respect to the mode of passage of bills.

Accordingly, at the June, 1912, term of the Supreme Court, in the case of *Greenberg v. City of Chicago*, wherein the validity of the Municipal Court Act was attacked on the ground that said act was not passed in conformity with the requirements of the constitution, this department filed an elaborate brief on the point referred to. This case was decided in the city's favor by the Supreme Court October 26, 1912 (256 Ill. 213). The decision, however, turned on points apart from the question as to whether the act had been passed in the mode prescribed by the constitution and threw no additional light upon the question which had been considered in the *Neiberger* case.

Before the opinion in the *Greenberg* case was rendered, the corporation counsel had also raised and argued the same point in the case of *People v. McWeeney* (being the so-called Armory Convention contempt case), which was taken to the Supreme Court at the October term, 1912. The Supreme Court handed down its opinion in this case June 18, 1913 (259 Ill. 161), and in said opinion the ruling in the *Neiberger* case was discussed and clarified and the rule in respect to the constitutional requirements as to the passage of a bill re-

stated in different form. Under the rule as re-stated in the McWeeney case the gas rate act of May 18, 1905, in our opinion, was constitutionally passed.

The Gas Company in its amended answer to the city's bill of complaint also alleged that the gas rate act of 1905 was unconstitutional in that it embraced more than one subject. This contention rests upon the fact that the act confers upon the City of Chicago power to sell surplus electricity and to prescribe the maximum rates and charges for gas and electricity. We did not and do not now consider the question a serious one and are satisfied that the courts would not hold the act unconstitutional on that ground.

In addition to the above mentioned efforts of this department to procure enlightenment as to the scope of the rule as stated in the Neiberger case and thus to clear up the question as to the constitutionality of the passage of the gas rate act, and with a view to having a valid gas rate act upon the statute books in the event that the Supreme Court should make it clear that the gas rate act of 1905 had not been constitutionally passed, and with the further view to at the same time eliminating all question in regard to the act embracing more than one subject, we prepared and caused to be introduced into the legislature of 1913 separate bills, one conferring power on the city to prescribe maximum rates for gas and the other for electricity. These bills passed the senate and were sent to the house and by it referred to the committee on municipal corporations. Neither of these bills was reported back to the house by said committee, although the mayor and the corporation counsel made every effort to have the bills reported back.

At and for some time prior to the rendition of the opinion in the McWeeney case a bill for a State Public Utilities Commission had been under consideration by the legislature then in session. An article was drafted at the instance of this department acting under the instructions of the mayor and incorporated in said bill conferring upon cities broad powers of regulation and control of public utilities within their territorial limits. (See article VI of bill as first passed by senate on June 20, 1913—Senate Journal of 1913, p. 2143.)

Mayor Harrison, the corporation counsel, many members of the city council, and many civic organizations of the city used every effort to have said article retained in the bill. However, said article was on the last night of the session of the legislature stricken from the bill by the house, and the bill was, on June 20, 1913, passed in its present form creating a commission with state wide jurisdiction. This bill was approved by the Governor June 30, 1913, and by its terms went into force and effect January 1, 1914.

It will be observed that there was an interval of but two days between the rendition of the decision in the McWeeney case which established the constitutionality of the passage of the gas rate act of 1905, and the passage of the State Public Utilities Commission bill.

The members of the State Public Utilities Commission have been appointed by the Governor and have organized and entered upon the performance of the duties prescribed in the State Public Utilities Commission act.

Much doubt exists as to the constitutionality and validity of the State Public Utilities law, and the appointment of the members of the commission without confirmation by the senate and while the legislature stood adjourned, and in regard to how far said law, if valid, deprives the City of Chicago of the powers in respect to public utilities within its limits which had been conferred upon and exercised by the city council prior to the going into effect of the State Public Utilities Commission law.

On December 29, 1913, the city council directed this department to institute such proceedings as should be necessary to determine the validity of the State Public Utilities Commission act, and circumstances are now developing which will probably afford a basis for such a proceeding.

If the State Public Utilities Commission law is valid, the power to fix gas rates and standards is apparently now vested in the commission and the city council no longer has such power. If said law is invalid, then the city retains the power to fix and enforce gas rates which it formerly possessed under the gas rate act of May 18, 1905.

In compliance with petitions of the requisite number of

voters the following question of public policy will be submitted to the voters of the City of Chicago at the election to be held April 7, 1914:

“Shall the State Legislature amend the act creating a State Public Utilities Commission, approved June 30, 1913, so as to provide for Home Rule and control by the City of Chicago of public utilities within the city?”

If this proposition receives a majority of the votes cast upon it (and it is confidently expected that such will be the case), a determined effort will be made to have the State Public Utilities Commission law amended in the particulars referred to in said proposition at the next session of the legislature.

During the investigation as to the price of gas in Chicago made by the Committee on Gas, Oil and Electric Light prior to the passage of the gas rate ordinance of July 17, 1911, Mr. William J. Hagenah, under date of April 17, 1911, made a written report to the Gas Sub-committee of said committee entitled, “Investigation of the Peoples Gas Light and Coke Company.” Thereafter at the request of said committee, Prof. Edward W. Bemis, under date of July 1, 1911, made a written report to said committee entitled, “Report upon the Price of Gas in Chicago.” In said report, Prof. Bemis, in effect, recommended a rate per one thousand cubic feet of 75c for the first year, 70c for the next three years and 65c for the fifth year of a five year period.

We recently had an interview with Prof. Bemis with the purpose of ascertaining his views in respect to the probability of sustaining the reasonableness of the rates for gas prescribed in the ordinance of July 17, 1911. Prof. Bemis stated that during the winter of 1912 and 1913 the price of oil had materially increased and as about four gallons of oil were used in the manufacture of one thousand cubic feet of gas of the kind manufactured by the Gas Company, a substantial increase in the cost of manufacturing gas had resulted, and that this, together with other facts which had developed since the passage of the ordinance, might make advisable a further consideration of the rates prescribed in said ordinance.

The foregoing answers your inquiry in respect to the

present status of the suit and also presents the circumstances and conditions which brought about such status.

Turning now to the inquiry as to the policy of this department with reference to the future prosecution of the suit, we beg to say that in view of the present uncertainty as to the city's powers in respect to fixing gas rates, resulting from the passage and going into effect of the State Public Utilities Commission law, and further in view of the justifiable expectation that the present State Public Utilities Commission law will be amended so as to provide for home rule and control by the City of Chicago of public utilities within the city, and so as to give the city a much wider range of power in respect to public utilities than it has heretofore enjoyed, and further, in view of the large expense that would be incurred by the city in prosecuting the suit under the conditions mentioned, we are constrained to the opinion that it would not be advisable to press the prosecution of the suit at this time.

If the city council desires us to proceed with the prosecution of the suit we suggest in view of the changed conditions alluded to by Prof. Bemis, that a further report be had from him; or such other person as the city council or your committee may select, as to the conditions which have developed since the gas rate ordinance was passed and the bearing and effect of such new conditions upon the question of the reasonableness of the rates prescribed in said ordinance.

Yours respectfully,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MARCH 31, 1914.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

In response to the request of your committee for an opinion concerning the right of a passenger on a car propelled

on Wabash avenue, on the payment of a single fare, to demand and receive a transfer entitling him to walk west a block to State street and there transfer onto a car running to the west side, we advise you that this question is controlled in the greater part by the 11th section of the ordinances of February 11, 1907, which, in so far as they pertain to the questions now under consideration, are as follows:

“UNIVERSAL TRANSFERS.

“Every such passenger may demand and upon such demand shall receive from the conductor of the car upon which he first takes passage, or from some authorized agent of the Company, a transfer. Said transfer shall entitle such passenger to ride upon any other line of said street railway system owned, leased or operated by the Company or any other line of street railway operated by any other corporation from which the Company is by this ordinance obligated to accept transfers, which connects with, crosses, intersects or comes within a distance of two hundred (200) feet of the line of said street railway upon which the passenger first took passage and paid his fare. But this obligation shall not apply to any connecting point in the south division of the City of Chicago north of Twelfth street, except that upon the completion and operation of subways under the provisions of this ordinance, transfers shall be given at all points within said subways where lines of railway of *any such corporation or corporations* connect with each other.

“The payment of a single fare shall not entitle a passenger to reverse his general direction of travel. If necessary to enable a passenger to reach his destination the conductor or other authorized agent of the Company shall issue without additional charge a transfer upon a transfer, the same as required upon payment of a cash fare; the intention being that for a single fare the Company shall carry any passenger for a single continuous ride over any of the said lines of street railway owned, operated or leased by it, within the limits of the said city, as long as such ride is in the same general direction, although some of the lines necessary to be used by such passenger in arriving at his destination intersect or cross one another, or do not conform to such direction.”

Exhibit “A” to the Chicago City Railway Company’s ordinance reads, in part:

“SCHEDULE OF STREETS UPON WHICH SHALL BE MAIN-

TAINED AND OPERATED TRACKS NOT EXCEEDING TWO EXCEPT WHERE OTHERWISE NOTED.

Adams street, from Dearborn street to Clark street.

Adams street, from State street to Dearborn street.

Harrison street, from Wabash avenue to State street.

Lake street, from Wabash avenue to State street.

Madison street, from Michigan avenue to State street.

Michigan avenue, from Randolph street to Madison street.

These tracks on Michigan avenue to be removed when the tracks on Garland court from Randolph street to Washington street are constructed and operated.

Randolph street, from Michigan avenue to State street.

Van Buren street, from Wabash avenue to Clark street.

Wabash avenue, from Lake street to 22d street."

Exhibit "A" to the Chicago Railways Company's ordinance, in so far as it is material to the question under consideration, reads:

"SCHEDULE OF STREETS UPON WHICH SHALL BE MAINTAINED AND OPERATED TRACKS NOT EXCEEDING TWO EXCEPT WHERE OTHERWISE NOTED.

Adams street, from State street to Center avenue.

Harrison street, from State street to Kedzie avenue.

Lake street, from Wabash avenue to State street.

Lake street, from State street to 48th avenue.

Monroe street, from Dearborn street to State street.

Randolph street, from State street to Union Park and Lake street.

Randolph street, from Michigan avenue to State street.

State street, from Polk street to Madison street. * * *

State street, from Madison street to Lake street. * * *

State street, from Lake street to Division street.

Van Buren street, from State street to Kedzie avenue."

The ordinance providing for unified operation of the Chicago City Railway lines and the Chicago Railways lines passed November 13, 1913, provides in Section 1 in part as follows:

"The companies severally and jointly agree to furnish an adequate and unified traction service within the

present and future limits of the City of Chicago, which shall provide for: * * *

(b) * * * elimination of all switchbacks in the downtown districts by use of loops or by the rerouting or through routing of cars."

As was stated to your committee in a recent opinion, the function of that portion of the Section 11 now under consideration is to accomplish a dual purpose, to wit, to furnish to the public adequate means of traveling from one point to another for a single fare and at the same time to prevent transfers from being so used as to defraud the street railway companies and the city.

It will be observed that the Chicago Railways Company is not permitted to operate on any north and south street lying east of State street.

It will also be observed that by the terms of the ordinance of November 13, 1913, the railway companies are not permitted to employ switchbacks in the operation of their cars, but are required to loop all cars.

Inasmuch as arrangements have now been perfected whereby the Chicago City Railway Company can operate cars on Garland court, it is no longer permitted to operate cars anywhere on Michigan avenue. It follows, therefore, that wherever the Chicago City Railway Company is authorized to operate any cars on any east and west street in the downtown district extending as far east as Wabash avenue, it must loop those cars onto Wabash avenue, which, of course, interferes more or less seriously with the regular street car traffic on Wabash avenue.

It will therefore be seen that under the terms of the ordinances under consideration the Chicago City Railway Company may be obligated to operate cars on Van Buren street, for instance, from State street to Wabash avenue, but that it may not switch those cars back at Wabash avenue but must loop them onto Wabash avenue and run them on Wabash avenue for at least one block either north or south; and the same situation prevails in effect on one or more of the other east and west streets. As we are advised, cars are not at present operated on these east and west streets east of State street

owing to the fact of the increased danger and delay occasioned by operation where an east and west line intersects a north and south line, and, as we are advised, the city has acquiesced in this state of affairs. But it does not follow from such acquiescence that the city may not now insist that the lines in question be operated across State street and to Wabash avenue, looping around on Wabash avenue in such a manner as to make a return to the original east and west street.

As we are advised, passengers having occasion to use any of the lines which operate in the loop district on Wabash avenue, have facilities which enable them for a single fare to ride on a north and south street and, by a transfer or system of transfers, to reach any desired locality on the west side. So that the question is not as to whether transfer facilities will be afforded to such passengers, but rather whether additional transfer facilities shall be afforded to them.

It will thus be seen that, by the terms of these various ordinances, which constitute a contract or contracts between the street railway companies on the one side and the city representing the public on the other side, there is provided a method whereby a passenger may, on the payment of a single fare, transfer—for instance at Van Buren street and Wabash avenue—onto a Van Buren street car running to the west side.

Owing to the numerous expressed provisions concerning transfers from the Wabash avenue line to west side lines, those provisions must, in our opinion, be taken as exclusive of all others.

It may, however, occur to your committee that none of the west side lines intersect, cross or come within 200 feet of the Wabash avenue line, for such is undoubtedly the fact, but it by no means follows that the city is powerless to alter this condition. On the contrary, there are no legal obstacles to the city forcing either of the companies to operate cars from State street to Wabash avenue on Van Buren street, for example. If the power of the city, to require either of the companies to extend its lines, or any of them, from State street to Wabash avenue, were otherwise wanting, it is nevertheless

found to exist in Section 3 of each of the ordinances of February 11, 1907.

Whether physical conditions and the interests of the general public dictate that the city exercise the power which it possesses in this regard are questions which are not our province to answer, and we therefore express no opinion concerning them.

We are of the opinion that so long as the city acquiesces in a termination of the east and west lines in question at State street, that it cannot require the street railway company, upon the receipt of a single fare, to give to a passenger paying such fare on the Wabash avenue line, a transfer that will enable him to walk from Wabash avenue to State street and there transfer onto one of the east and west lines.

Yours respectfully,

CHAS. M. HAFT,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 6, 1914.

EDGAR L. MASTERS, ESQ., 1310 Marquette Bldg., City.

Dear Sir:

In response to your inquiry as to whether the publication known as "Daily Racing Form" is to be regarded as a daily newspaper within the terms of Section 2471 of the Chicago Code of 1911 authorizing the sale of daily newspapers printed and published in Chicago from street stands, we have come to the conclusion, after careful consideration of the matter, that this publication is not a "newspaper" under the meaning which must be placed on the word as used in said section.

In passing upon the rights of the publication known as "The Day Book," some time ago, this department held that, although the dictionaries confine the word as applying to only the blanket sheet ordinarily used, a publication of almost any form or shape issued at stated intervals containing general news which goes to the general public, must be regarded

as a newspaper. At the same time we called attention to the large number of judicial interpretations of the word newspaper, and stated that the gist of same is to the effect that while such liberal interpretation has been put upon the word such publications are to be distinguished from literary, scientific, religious, medical and legal journals which are obviously intended for one class of people.

This view is borne out by the reviewing courts in our own state, which, while giving a very broad interpretation to the word, nevertheless in each instance call attention to the fact that the particular journal under consideration contains news of interest to the general reader.

Kerr v. Hitt, 75 Ill. 51.

Maass v. Hess, 41 Ill. App. 282.

Railton v. Lauder, 126 Ill. 219.

Pentzel v. Squire, 161 Ill. 345.

In other words, it is not any and every publication that prints news that may be regarded as a newspaper, but the distinguishing feature is whether or not the news is of interest to the general public.

Webster defines a newspaper as follows:

"A sheet of paper printed and distributed, at stated intervals, for conveying intelligence of passing events, advocating opinions, etc.; a public print that circulates news, advertisements, proceedings of legislative bodies, public announcements, etc."

The Century Dictionary gives a somewhat broader definition, and makes a classification of general and special newspapers, but in defining a special newspaper still contemplates that it shall include general news.

"A paper containing news; a sheet containing intelligence or reports of passing events, issued at short but regular intervals, and either sold or distributed gratis; a public print or daily, weekly or semi-weekly periodical, that presents the news of the day, such as the doings of political, legislative or other public bodies, local, provincial or national current events, items of public interest on science, religion, commerce, as well as trade, market and money reports, advertisements and announcements, etc. Newspapers may be classed as *general*, devoted to the dissemination of intelligence on a great va-

riety of topics which are of interest to the general reader, or *special*, in which some particular subject, as religion, temperance, literature, law, etc., has prominence, general news occupying only a secondary place. * * *"

(The Century Dictionary.)

Bouvier defines newspapers as "papers for conveying news, printed and distributed periodically," but cites authorities sustaining the position we take and one which holds that a paper "devoted specially to the interests of the legal profession" is not a newspaper. (*Beecher v. Stephens*, 25 Minn. 146.)

Burrill, Law Dictionary, gives this definition:

"A printed publication, issued in numbers at stated intervals, conveying intelligence of passing events. The term 'newspaper' is properly applied only to such publications as are issued in a single sheet and at short intervals, as daily or weekly."

While there is no limitation as to the character of the news printed in the last definition, the inference is plain that it was intended to apply only to such newspapers of general circulation and containing such general news as we expect to find in the ordinary daily newspaper.

Perhaps as good an interpretation as can be found is contained in the following excerpt:

"It is difficult, if not impossible, to determine with clearness and exactness where the lines of demarkation should be drawn between a newspaper, in a legal and common acceptance of the terms, and the numerous publications devoted to some special purpose, and which circulate only among a certain class of the people, and which are not within the purview of statutes requiring publication of legal notices in some newspaper. The daily and weekly newspapers common to all parts of the country, of general circulation among the people, without regard to class, vocation or calling, devoted to the gathering and dissemination of news of current events of interest to all, and usually espousing and advocating principles of some political party with persistency, if not at all times with consistency, are, without doubt, newspapers, within the meaning of the statute. On the contrary, many publications, such as literary, scientific, religious, medical and legal journals, that are obviously for but one class of the people, and that class always but a small

part of the entire public, are not newspapers, within the legal and ordinary meaning of the word. * * *

Hanscom v. Mayer, 60 Neb. 68.

To the same effect see the following cases:

Crowell v. Parker, 22 R. I. 51.

Lynch v. Durfee, 101 Mich. 171.

Hull v. King, 38 Minn. 349.

Rosewater v. Pinzenscham, 38 Neb. 835.

We have examined a number of copies of "Daily Racing Form" which were turned over to us by you. We find nothing in them except racing news. There is not even an advertisement, except such as advertise the publications of the owners of the paper. While the question of whether or not it is a newspaper does not turn on the presence of advertising matter, the total absence of same is a detail to be considered.

It is stated in your letter that there is nothing in this publication which is in violation of the ordinances of the city. We are not at all convinced on this point. The odds given in the betting on the preceding day are published, and in the schedule of the races for the current day record of past performances are given with the odds in the betting. To those who are familiar with such tables there is known a method of calculating the possibilities for the forthcoming race and the odds that will most likely be given.

This may not be a violation of existing ordinances, but it is quite clear that the publishers have gone as far as they could without openly defying the law in giving information designed to be of value to persons who bet on the races.

There is no general information in the paper which is of interest to the public as a whole or any considerable portion of it. Even those interested in horses from a commercial standpoint as breeders or traders can discover nothing that would tend to enlighten them in the prosecution of their business.

Such being the case, we are compelled to hold that the publication is "obviously intended for but one class of the people, and that class always but a small part of the entire

public," and that it falls within those publications which must be excluded from the "legal and ordinary meaning of the word newspaper," in accordance with the authority quoted from.

The attitude of the department of police in respect to the publication in question is, therefore, entirely justifiable.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 8, 1914.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

Your letter concerning employers' liability insurance to be carried by contractors with whom the city deals, to which is attached a copy of a communication from S. D. Childs & Company, was referred to the undersigned for an opinion.

The question raised is whether it is necessary to require this company to take out insurance covering injuries to employes in an insurance company before proceeding with the work of manufacturing aluminum vehicle tags for the city. From the letter attached to yours it appears that this company sets aside a certain percentage of its pay-roll as an insurance fund to meet its liability for such injuries.

The workmen's compensation act recently passed by the legislature makes a classification of extra-hazardous occupations in which the term "employer" embraces not only the person, firm or corporation with whom the immediate relation exists, but also any party contracting with such person, firm or corporation for work to be done in such extra-hazardous occupation, the latter being jointly liable with the former.

Under Section 31 of said act a party so contracting with the immediate employer may escape this liability by requiring the latter to insure his employes; and since the municipality comes within the provisions relating to such joint liability, it must be plain to you that unless this insurance is required

the city will drawn down upon itself an immense number of claims that would otherwise be avoided. Hence, the necessity for providing by ordinance that contractors must insure their liability to pay the compensation provided for in the act.

The use of general terms in the enumeration of employments classed as extra-hazardous makes it somewhat uncertain, in the absence of any judicial interpretation, how far the law intends this classification to extend; and in any event, there are so many occupations that must necessarily come within the scope of this classification that it was not deemed wise, in drafting ordinances to meet this situation, to place upon the heads of the various departments the burden and responsibility of determining in each instance whether the work contracted for is within an extra-hazardous occupation or not.

Therefore, in amending the sections of the Code so as to make provision for the insurance of employes by contractors the ordinances were drawn so as to include all contractors. Circumstances have already arisen which make it doubtful whether this was the best course to pursue, but since this was done in this manner, we must look upon all contractors as included in the terms of the ordinances. Consequently, the only point to be decided is whether the language of the statute, which was followed in the ordinances is to be construed as necessitating the placing of insurance in an insurance company or whether some such setting apart of a fund for the payment of claims under the act, as is done by this company, satisfies the requirements of the statute.

The language used in Section 31 of the act is as follows:

“Any person, firm or corporation, who undertakes to do or contracts with others to do, or have done for him, them or it, any work enumerated as extra-hazardous in paragraph (b), Section 3, requiring employment of employes in, on or about the premises where he, they or it, as principal or principals, contract to do such work, or any part thereof, and does not require of the person, firm or corporation undertaking to do such work for said principal or principals, that such person, firm or corporation undertaking to do such work shall insure his, their or its liability to pay the compensation provided in this act to his, their or its employes * * * such person,

firm or corporation shall be included in the term 'employer' and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this act."

It will be observed that the word "insure" is used in its limited sense in the above section and not in the sense of satisfying the principal that the compensation will be paid if any liability accrues. Moreover, there is no provision in the act for avoiding liability in case a fund is reserved by the immediate employer as contemplated in this case.

The word insure, even if given a broader interpretation, must be held to imply some greater degree of guaranty than arises from the mere setting aside of a sum of money for a purpose to which the person so setting it aside has access at all times and over which he exercises complete control. It may be in entire accord with good business principles to provide for such liability in this way instead of paying the money to an insurance company, but it cannot be regarded in the light of security to the injured party, and it furnishes no assurance to a third party that the fund will always be available. The Century Dictionary gives the following definition of the word "insure," which is in harmony with the generally accepting meaning:

"To guarantee or secure indemnity for future loss or damage (as to a building from fire, or to a person from accident or death), on certain stipulated conditions."

It seems unreasonable to believe that it was the intention of the legislature to force upon manufacturers the alternative of either taking out employers' liability insurance or losing the business of concerns that seek to avoid the joint liability imposed upon them by statute. But there seems to be no escape from the conclusion that this is the effect of the provision under consideration. In the event that the legislature had intended that the principal could avoid liability in the case of a concern carrying its own insurance by setting aside a reserve fund for that purpose, it would undoubtedly have provided immunity for same from the attacks of creditors and prohibited the employer from drawing on it when occasion arises for other purposes.

Since there has been no adjudication of the rights of the respective parties in a matter of this kind to which we can look for authority, we are compelled to rely on what appears to be the only reasonable construction of the law in this respect, which is that in order to avoid liability the city must insist on insurance being carried.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 8, 1914.

PHILIP J. MCKENNA, Esq., Attorney, Board of Local Improvements.

Dear Sir:

I have examined the question presented with the communication of Eugene H. Dupee of your department, namely, Has there been a valid dedication and acceptance of part of certain property between North 48th avenue and Elston avenue as part of Foster avenue, under the provisions of the Torrens System?

The records of the Map Department do not show any such dedication.

This matter has heretofore been considered by this department in a communication to Charles T. Farson, Chief Examiner of Titles, dated March 1, 1912.

Section 91 of the act entitled "An act concerning land titles" does not contain any provision that would be held to imply the power to approve and record plats and thereby vest the fee title of same in the city.

Section 2 of Chapter 109, Revised Statutes, provides that "the certificate of the surveyor and of acknowledgment, together with the plat, shall be recorded in the recorder's office of the county in which the land is situated."

It is therefore mandatory that such plat, in order to convey the fee title, be recorded in the recorder's office.

However, if after initial registration land shall have been

subdivided into blocks and lots and a plat thereof, *made in conformity with the statutes concerning the making of plats*, shall have been filed in the office of the registrar, then when the registered owner makes a deed of transfer, etc., the registrar may, instead of canceling such certificate and entering a new certificate to the grantor for the land not included in such transfer, enter on the original certificate a memorial of such deed of transfer and that the certificate is canceled as to such blocks or lots. (Section 91, aforesaid.)

The Examiner of Subdivisions has not approved any plat showing a dedication of the land in question.

According to my construction of the law the holder of a registered land title, after compliance with the statute on plats, may file a certified copy of such recorded plat with the registrar in order that the records in said department shall show this fact and in order that registration certificates may be issued accordingly.

There having been no dedication, the question of acceptance does not arise.

Very truly yours,
NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

APRIL 8, 1914.

HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

Your letter of recent date, in which you call attention to an order appearing on page 4173 of the Council Journal for March 2, 1914, directing the general superintendent of police to detail policemen night and day at the various grade crossings of the Chicago & Oak Park Elevated Railroad Co., in Austin, and to maintain such detail until such time as the City of Chicago can compel said railroad company to provide ample protection at these crossings, was referred to the undersigned for consideration and reply.

You state in your letter that to follow out the order of

the city council, it would necessitate taking away all other police protection from that section of Austin, since the number of officers it is possible to assign there, in justice to other parts of the city, is limited.

You also state that it is your understanding that this is merely an order of the city council and not an ordinance, and, therefore, not binding upon the department, but ask to be advised as to this point.

In our opinion, the order of the city council must be observed as a proper exercise of legislative power. It is true that an order cannot override an ordinance, and, therefore, whenever an order is passed that contravenes an ordinance of the city, it is of no binding effect. This has given rise to the mistaken impression that an order is not a legislative act which calls for strict observance, but is to be regarded as directory. But, in some respects, and within the limited field in which an order may be used, it is as binding as an ordinance.

It was held in the case of *Chicago & N. P. R. R. Co. v. Chicago*, 174 Ill. 439, that acts of the city which have for their object the carrying into effect of charter powers are legislative in their character and must be passed in the form of ordinances. This rule has been followed in a large number of cases, but it does not deprive an order of the city council of binding force when it is confined to acts of an administrative or executive nature.

Article V, Section 3, of the Cities and Villages Act, contemplates that the city council may act by ordinance, order or resolution. When this provision is read in the light of the line of decisions which we refer to above, it must be understood that an order necessarily implies an act of a temporary or administrative character, as distinguished from a permanent rule of conduct which can only be established by ordinance.

We therefore beg to advise you that it is incumbent upon you, as head of the department of police, to act in accordance with the direction contained in the order referred to and that your only recourse in case it hampers the work of your department is to present the matter to the city council with such

recommendation as you see fit in order to relieve the situation.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 8, 1914.

HON. GEORGE B. YOUNG, M. D., Commissioner of Health, City
of Chicago.

Dear Sir:

In your letter of recent date you call attention to an order of the city council, passed on March 23, 1914, and appearing on page 4489 of the Council Journal of that date, and ask to be advised as to the proper course for you to pursue.

The said order reads as follows:

“Ordered, That the Commissioner of Health, the City Treasurer and the City Comptroller be and they are hereby authorized, in approving vouchers and passing same for payment against appropriations under Account 37 A 22, Department of Health, Operation Municipal Garbage Plant, to ignore the fixed salaries where same are not in accordance with the union scale of wages for the work designated and to pay salaries from said appropriations at the regular union scale of wages.”

The question raised is whether the city council, by an order of this character, can authorize the head of a department to ignore the salaries fixed by the appropriation bill and pay such salaries as are in accordance with the union scale of wages, which, in this instance, would require the expenditure of a large amount of money over and above the appropriation.

We do not regard the order in question as sufficient authority to warrant your making the changes in salaries contemplated therein. It is at best doubtful whether such changes can lawfully be made by the enactment of an ordinance as indicated herein, but it is certain that no such general order as the above can be followed with safety by the city officers mentioned in same.

Section 3 of the annual appropriation ordinance prohibits the heads of departments from incurring any liabilities against any account in excess of the amount authorized by the appropriation bill and from changing any salary or wages item in same. Aside from that, Section 1646 of the Chicago Code of 1911 provides that salaries and compensation of employes shall be determined and fixed in the annual appropriation bill. Such being the case, it is quite clear that the above order cannot alter salaries.

There seems to be nothing in the statutes which expressly prohibits the changing of an employe's salary during the fiscal year, although there are numerous provisions which render it impossible to change the salary of an officer of the city during such period.

It was held in the case of *City of Chicago v. Berger*, 100 Ill. App. 158, that the legal transfer of money from one fund to another by the authorities of a municipal corporation is not an appropriation, and that this could be done at any time during the year. In that case there was a transfer of certain money which had been deposited by the railway companies in a fund provided for track elevation which was turned over to the credit of the corporation counsel on account of expenses properly chargeable to track elevation.

It will be noted that the circumstances were entirely different than in the present instance, and the case in question is far from being conclusive on the point involved. Nevertheless this case is looked upon as furnishing sufficient authority for making a transfer from one fund to another in the same department (but not to make an additional appropriation) when it is found necessary to do so by reason of some particular item of the appropriation for the department being exhausted.

Following the custom which has grown up under the construction placed on the above authority, we would not hesitate to advise you that, in case the city council sees fit to draw on some other fund appropriated for the disposition of garbage and to raise the salaries of certain of the employes by ordinance, you would be justified in preparing the payroll in accordance therewith. The ordinance, however, would

have to be drafted so as to specifically name the positions which are entitled to the extra pay and designate the fund from which the additional pay is to come, and it should provide for the repeal of such ordinances or parts of ordinances as are in conflict with it.

If that is done, the appropriation for the purchase and maintenance of the garbage reduction plant not having been included in the tax levy ordinance, it would be possible to carry out the intention of the city council without risk to yourself and your bondsmen—otherwise not.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 13, 1914.

HON. JOHN E. TRAEGER, City Comptroller, City of Chicago.

Dear Sir:

In your letter of recent date you referred to this department the question of whether the present method of handling receipts and disbursements in the office of the inspector of oils was in accordance with the laws and ordinances.

You state that the salaries and expenses of the office in question followed the classification and appropriations as detailed on page 53 of the budget of 1914, but that the oil inspector makes the disbursements direct, and when he submits his monthly report to the comptroller he makes deductions from the gross receipts for moneys paid out by him for salaries and expenses of his office.

You also state that this method of handling the business of the office has been pursued for many years and possesses some advantages, but you inquire whether such expenditures are legal, since they do not conform to the usual practice of having the pay-roll approved by the civil service commission and payments made by warrants drawn on the city treasurer signed by the mayor and city comptroller.

We are unable to discover any authority in either the statutes or the city ordinances for continuing to handle the funds of the oil inspector's office in this way. The practice arose under the old statute which permitted it until it was altered in 1911, but it should now be done away with.

In the year 1911 the legislature amended the Oil Inspection Act by providing, among other things, that all fees collected shall be paid into the city treasury. After this act was passed, the ordinances of the city were amended (July 22, 1912, Council Journal, pp. 1648-1650) so as to require the payment of all fees into the city treasury. The second paragraph of Section 1673a of the Code makes it obligatory upon the inspector of oils to make a report to the comptroller on or before the 10th day of each month, and to pay into the city treasury at the same time "the amount of all such fees and charges so collected by him." The statute was again amended in 1913, but there was no change so far as the provision in question is concerned.

We therefore recommend that in case the old practice is still being followed, it should be discontinued and the method specified by the ordinance be pursued.

The positions in the office of the oil inspector are not under civil service. The statute provides that the oil inspector, "with the approval of the power appointing him, may appoint deputies, for whom he shall be responsible, who shall take the same oath and be liable to the same penalties as the inspector." In pursuance of this clause of the statute the present employes were named by the inspector of oils, and submitted by him to the mayor and the city council, and the appointments were concurred in by that body on May 27, 1912 (Council Journal, p. 411).

Therefore, if for convenience or in pursuance of the regular practice of your department, the pay-roll is referred to the civil service commission, it should be marked as exempt from the provisions of the Civil Service Act.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 14, 1914.

HON. JAMES S. MCINERNEY, Prosecuting Attorney.

Dear Sir:

In reply to the letters of the chief assistant prosecuting attorney dated, respectively, December 1, 1913, and February 18, 1914, concerning the validity of Section 108-a of the Chicago Code of 1911, we beg leave to submit the following:

The inquiry in each case is directed, first to the validity of the ordinance in question, and second as to whether prosecution may be started under same. As to any prosecutions being maintained under Section 108-a, that is out of the question, because there is no provision made for a penalty and it was not intended to be enforced in that way. The section provides for a revocation of the license in case the licensee does certain things prohibited in the license. We will, therefore, direct our answer to the question of the validity of this provision and the possibility of enforcing same.

The legislature in 1907 passed an act requiring that the price of tickets be printed thereon and making it a misdemeanor to sell same for a higher price, also making it a misdemeanor for persons operating places of amusement to establish an agency for the sale of tickets at a price greater than that asked therefor at the box office.

This act was declared unconstitutional in the case of *People v. Steele*, 231 Ill. 340. In the opinion of the Supreme Court rendered in the case it was held that, in order to sustain an act regulating a lawful private business, the act must tend in some degree to the prevention of offenses or the preservation of the public health, morals, safety or welfare. This decision, while directed at a state law, has the effect of limiting the city's authority in spite of the broad grant of power to the city council over the subject matter, which includes power to suppress and prohibit theatrical and other exhibitions, shows and amusements, and in the face of decisions to the effect that, when authority is given to suppress and prohibit, the city council may do anything short of that, so that it may impose such obligation as it sees fit whenever it has power to suppress and prohibit. That opinion, there-

fore, can only be read in the light of a modification of the grant of power given to the city council.

With this decision before it, the city council undertook to in some way regulate theaters so as to provide against extortion and speculation in tickets, and acting under the advice of the corporation counsel, passed two amendatory ordinances, one of which is known as Section 108-a, and the other as Section 2030 of the Chicago Code of 1911. These ordinances appear in the Council Journal of June 3, 1912, on pages 622 and 623. The latter ordinance (Sec. 2030) relates to the obstruction of sidewalks, and as amended prohibits persons from having tickets in their possession for the purpose of selling same, or offering same for sale, in front of any theater or other place of amusement, for the purpose of speculating in such tickets. There is little doubt as to Section 2030 being valid and enforceable, and we know of no instance where its validity has been called in question.

As to the former ordinance (Sec. 108-a), it provides that there should be a condition inserted in the license to the effect that the licensee will not give or grant options upon seats for the purpose of speculation, or accept the return of unsold tickets, or charge or permit the charge of more than the price printed thereon, and that all seats should be sold and disposed of to the public applying therefor at the box office. The section provides further, that in case the licensee fails or refuses to comply with any of the conditions named in the license the same may be revoked by the mayor.

Having in mind the full significance of the opinion referred to above, we still believe that Section 108-a is effective, since the acceptance of a license with the conditions named therein binds the licensee to the terms specified in the conditions. We base this opinion on three cases in which the same and a similar grant of power to cities and villages were involved.

In the case of *Schwuchow v. City of Chicago*, 68 Ill. 444, which was a liquor license case, the court held that the party who took out a license received it with certain conditions attached, and by accepting the same he thereby assented to the terms and conditions.

"But, above all, appellant, by accepting and acting under this license, consented that the mayor might, in his discretion, revoke it, and, having agreed to it, he now has no right to insist that it shall be adjudged forfeited by a judicial tribunal by some process which does not occur to us as applicable to that end."

Schwuchow v. City of Chicago, 68 Ill. 444.

The same rule was maintained in *Launder v. City of Chicago*, 111 Ill. 291, which was a pawnbroker's case. In that case the court said:

"In this case, without a license the appellant has no right to engage in the business of a pawnbroker within the city. He sought for and obtained the city's license to transact such business, and took the privilege his license conferred, subject to the restrictions and burdens imposed by the ordinance under which, alone, it could issue. This was an unmistakable recognition and admission of the validity and binding force of the ordinance. By taking such license he secured immunity from prosecution for engaging in his vocation, if he conformed to the terms on which it was given him. The ordinance certainly did not invade any right of property or other right, but it conferred a right. Appellant having profited by taking a license, with full knowledge of the conditions imposed, cannot refuse to carry out such conditions."

Launder v. City of Chicago, 111 Ill. 291-296.

In the case of *Malkan v. City of Chicago*, 217 Ill. 471, which was again a liquor license case, the court used the following language:

"The license issued to the appellant contained the provision: 'This license, with all the rights under it, is subject to revocation at the discretion of the mayor, and this license, with all the rights under it, shall terminate absolutely upon the notice of said revocation being left at the bar, and the person to whom it is issued shall stand in the same position as if he had not taken out any license.' Appellant accepted his license with knowledge that the ordinance of the city provided for the revocation of the same in the manner stated, and also accepted a license with the provision in it that it is subject to revocation at the discretion of the mayor. By thus accepting the license, he assented to its terms and conditions."

Malkan v. City of Chicago, 217 Ill. 471-477.

It will thus be seen that the court applies the rule not only to liquor license cases, in which it has oftentimes stated that they stand on a different footing than other cases, but it applies the rule also to the case of a pawnbroker, whose business, so far as we are able to judge, stands on precisely the same footing as the business of operating theatricals, shows and other amusements.

The only question that can be raised is whether the city has exceeded its powers in placing such a condition in the license that it issues.

In case the regulations contained in this ordinance were obligatory on every one and separate and distinct from the matter of issuing the license, there is little doubt but that they would be held invalid, since similar regulations were so held in the Steele case. But when they are annexed to a license provision and are applicable to such persons as accept a license under the conditions imposed so that they only bind a party who seeks the license with its limitations and conditions and who can refuse to accept same if he does not wish to conform to the terms contained therein, there is every reason to believe a different rule will be applied. In any event, the objection to the condition in the license would have to be raised before it is accepted by the licensee if any consideration is to be given to such objection by the courts. A licensee will not be permitted to assent to the terms by accepting the license and then refuse to be bound by them.

The Steele case was decided on the point that it deprived the defendants of constitutional rights, but that principle cannot be said to be involved in the case presented under the ordinance.

We are, therefore, of the opinion that Section 108-a is enforceable, but it will have to be enforced as it was intended to be enforced, namely, by revocation of the license and not by prosecution for violation of same.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 14, 1914.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

We are in receipt of a letter from Mr. L. E. Gosselin, Auditor, concerning appropriation made for salaries for the Board of Examiners of Mason Contractors. He calls attention to the fact that all three members of the board are city officers or employes and that appropriations are made for them in the various departments to which they belong, and that the appropriations for salaries as members of the board of examiners provide for extra compensation, so that each of these men will draw pay from two different pay-rolls.

We have searched the statutes and the city ordinances to ascertain whether there was anything contrary to law in this arrangement, but we find nothing that prevents an officer or employe of the city from drawing his salary from two different sources; that is what this arrangement amounts to.

The statute prohibits a change in salary of an officer after it has once been fixed by the annual appropriation bill, and Section 1646 of the Code requires that salaries or compensation of all officers, clerks or employes shall be determined and fixed by the city council in the annual appropriation bill. Consequently there can be no change after the passage of the appropriation bill, but there is nothing unlawful in appropriating in such a way that an officer's or employer's salary is divided and charged up to two or more accounts. The precedent in this respect has already been established, since the Harbor and Subway Commission included one or more city employes and additional salary was allowed for work on that commission.

The propriety of one person holding two positions is simply a question of expediency and policy, there being a distinct advantage to the city in some cases when such plan is adopted. In the present instance the statute requires the building commissioner to be ex-officio chairman of the board of examiners, so that neither the mayor nor the city council

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had any choice with regard to that appointment, except that they had the right to fix the additional salary, if any.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

APRIL 14, 1914.

HON. JOHN MCWEENY, General Superintendent of Police,
Chicago.

Dear Sir:

Yesterday the County Court of this county entered an order on a petition filed in that court by a majority of the democratic county central committeemen elected at the election held last Tuesday, directing the republican member of the Board of Election Commissioners of this city to attend the meeting of said county central committeemen to be held tomorrow at the Seventh Regiment Armory, Wentworth avenue and 34th street, in this city, to call said meeting to order and preside until the election of a chairman and secretary of said meeting.

I understand that said order further directed the sheriff of this county and the superintendent of police of this city to prevent interference by any one with said representative of the County Court and with the performance of his duty.

A similar order was entered by said court in regard to the meeting of the republican county central committeemen at the First Regiment Armory, one of the democratic members of the election board being the court's representative for the above purpose.

It is your duty to obey the said order of the County Court. There was no necessity, however, for any specific instruction for you so to do by the County Court, as you have the power and it is made your duty by the statutes of this state and the ordinances of this city to preserve the peace and protect persons and property.

You should, therefore, by the exercise of the power of

your office, or acting in conjunction with the sheriff of this county, prevent interference with the court's representative in the performance of his duty and in general see that the peace is preserved and persons and property fully protected.

In view of an article in one of the morning papers to the effect that the commanding officer of the Seventh Regiment of the state militia (whose armory has been rented for the holding of the democratic convention) will assign members of that regiment to attend the convention for the purpose of protecting state property on the premises, I deem it advisable to state to you that no member of said regiment, whether an officer thereof or not, should be permitted to interfere with you or the members of your force in the performance of your duty. The armory having been rented to the democratic party for the holding of the meeting, the regiment and its members have no control over it or those who may occupy it tomorrow, or until the convention adjourns.

The local civil authorities being fully able to preserve the peace; no request having been made by the local civil authorities to the governor of the state for any militia assistance; no condition existing which would justify the governor in ordering the militia to interfere, and no order having been issued by the governor directing the militia to assist the local civil authorities, your authority in the premises is co-ordinate with that of the sheriff of this county, and it is your duty as superintendent of police and jointly with the sheriff to preserve the peace, protect persons and property and cause compliance with all ordinances of the city and laws of the state and orders of the courts of competent jurisdiction without any interference except by order of a court of competent jurisdiction.

In the event that the governor directed the militia to render assistance, such assistance would be subject to the orders of the local civil authorities and not independent of it until all civil authority was suspended and a state of martial law was created. That is certainly a very remote possibility, now or at any other time, in this city. There would be no necessity of any discussion of this character were it not for

the fact of the above publication of the statement of the intentions of said regimental officer.

Personally I believe the officer was misunderstood and there is little cause to fear that he would be so regardless of strict recognition of a proper administration of law by the properly constituted authorities as himself by a thoughtless act to bring about a disturbance of the peace of this city.

Respectfully,

WM. H. SEXTON,
Corporation Counsel.

APRIL 15, 1914.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

Replying to your inquiry of April 10, 1914, as to whether the authorization of the State Public Utilities Commission to be printed across the face of the bonds of the Chicago Railways Company in red ink as follows, "State Public Utilities Commission of Illinois, Authorization No. 8, 1914," will so alter the bonds that you will have to withhold your certificate required under the ordinance of February 11, 1907, we reply as follows:

The Public Utilities Act does not affect the powers and duties of the city comptroller under paragraph 40 of the ordinance of February 11, 1907, in any respect. He will continue to exercise these powers and duties as provided in said ordinance as he has done in the past.

Section 20 of the Public Utilities Act provides:

"The power of public utilities to issue stocks, stock certificates, bonds, notes and other evidences of indebtedness and to create liens on their property is a special privilege, the right of supervision, regulation, restriction and control of which is and shall continue to be vested in the state, and such power shall be exercised by the commission hereby created according to the provisions of this act and under such rules and regulations as the commission may prescribe."

It seems that the only question that can arise is whether the printing of the authorization in red ink across the face of the bonds as above set forth is in compliance with such

rules and regulations as the commission may have prescribed. As to what rules and regulations, if any, have been adopted by the commission to govern questions of this kind, we are not advised. If any have been adopted, compliance with the same is a question between the commission and the company, and is a matter separate and distinct from the powers and duties of the city comptroller under the ordinance.

While perhaps it is not properly a question for the decision of this department, as the action of the commission is the exercise of a state and not a city function, still we are of the opinion that the recital above referred to printed upon the face of the bonds does not amount to a mutilation or defacement of the same or in any manner impair their validity, provided, however, that such printing is not in violation of an express rule of the commission.

Respectfully submitted,

JAMES G. SKINNER,

Assistant Corporation Counsel.

JOHN W. BECKWITH,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 20, 1914.

BERT H. PECK, Esq., City Telephone Supervisor.

Dear Sir:

We are in receipt of your communication of the 6th inst., asking for an opinion as to whether in case the amount to be paid by the Chicago Telephone Company to its employes under the employes' pension, sickness, accident and death benefit plan provided for in Section 3 of the Telephone Company's ordinance of May 26, 1913, "is less than \$100,000.00 per annum, the Telephone Company is compelled to increase their benefits to such a point that this amount will be paid directly to their employes each year; whether they would be compelled to pay the difference existing to an accumulative fund to care for future benefits or whether they would be re-

lieved of the necessity for making the full payment as provided in the ordinance."

The provisions of said Section 3 in respect to said pension "plan" is as follows:

"That said Chicago Telephone Company shall also put into effect and maintain, during the entire period of five years for which the maximum rates of said Company are fixed by this ordinance, the employes' pension, sickness, accident and death benefit plan of the American Telephone and Telegraph Company, or any amendment thereof or any substitute therefor, under which plan, or amendment thereof or substitute therefor the Company shall pay to its employes or other beneficiaries at least one hundred thousand dollars (\$100,000) per annum for pensions, sickness, accident and death benefits."

The language quoted is perfectly plain in its meaning, and admits of no construction. By it, the Telephone Company agrees to pay to its employes or other beneficiaries "at least one hundred thousand dollars (\$100,000) per annum for pensions, sickness, accident and death benefits." This provision would not be fulfilled by the payment of any less sum than \$100,000.

There is nothing in the ordinance which provides that if the company pays less than \$100,000 in any year, the difference between the amount actually paid in such year and \$100,000 shall be paid into "an accumulative fund to care for future benefits."

By the terms of Section 3 of said ordinance, the agreement of the Telephone Company in respect to the payment of at least \$100,000 per annum for the purposes above mentioned is made a condition of the passage of the ordinance. Section 6 of said ordinance provides for a forfeiture of said ordinance as well as said Telephone Company's ordinance of November 6, 1907, in the event that the company makes default (continuing three months) in the observance or performance of any of the duties, agreements or obligations imposed upon the company by the ordinance of May 26, 1913.

If the company fails to pay to its employes or other beneficiaries at least \$100,000 per annum for pensions, sickness, accident and death benefits, during each of the five years for

which the maximum rates of the company were fixed by said ordinance of May 26, 1913, then the ordinances of November 6, 1907, and May 26, 1913, would be subject to forfeiture by the city.

Yours truly,

B. Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

APRIL 27, 1914.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In answer to the communication of John J. Herrick, Esq., of the 14th inst., with reference to the validity of a certain agreement or lease for the use of the dock and docking privileges on the south side of the Chicago River between the west line of Clark street and the west line of La Salle street for the seasons of 1913 and 1914, we wish to say that this matter has been thoroughly considered by this department and we are of the opinion that said agreement with the Chicago and South Haven Steamship Company, which was authorized by the city council February 28, 1913, is void and of no effect, for the following reasons:

1. Pursuant to the act of February 27, 1847, entitled "An act to adjust and settle the wharfing privileges in Chicago and for other purposes," the common council, February 11, 1848, passed an ordinance vacating part of Water street on the south side of the Chicago River.

2. In consideration of the consent of the property owners to said vacation, the City of Chicago executed and delivered to them deeds which vested in them the fee simple title in all of said new lots, including the portion of them fronting on the river and to be occupied by wharfs, subject, nevertheless, to the condition that:

"five feet in width extending the whole length of the front of said premises on the river shall forever remain an open wharf or dock to be built and maintained in

good order by said party of the second part, his heirs and assigns *for the free passage of persons on foot*, and that *in no case shall passengers by water be subject to any charge whatever for landing their ordinary traveling baggage and conveying the same over said wharf*, and that the top of said wharf shall be at all times properly and safely planked or covered so as to afford secure passage for such passengers and baggage."

3. The title thus conveyed was confirmed in said owners in 1857 by proceedings had in the Circuit Court, the decree reciting that all persons and corporations, except those entitled to said lots or some interest therein under said deeds, be forever barred from having, asserting, or maintaining any claim, title or interest in the same.

It is manifest to us that under such conditions the City of Chicago is without power to grant to any person or corporation the privilege to use said docks to the exclusion of the owners of property fronting on the river and of all persons wishing to pass over the same on foot or to land at the dock with their baggage, free of charge.

The city's power in the disposal of dockage space at the point in question is confined to the space between the east and west lines of La Salle street, but does not extend to the dock in front of private property.

We therefore advise that you cancel said agreement upon giving ten days' notice in writing, as provided in the order of February 28, 1913.

Said communication of John J. Herrick is herewith returned.

Very truly yours,
NICHOLIS MICHELS,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

April 29, 1914.

HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

In reply to your letter of the 25th instant., enclosing a communication from William A. Pinkerton, relative to the

licensing of sample carriers, I beg to advise you that I have prepared a draft of an ordinance covering this subject which I transmit herewith.

We are of the opinion that power to pass the ordinance enclosed is derived from clause 42 of Section 1, Article 5 of the Cities and Villages Act (Hurd's Revised Statutes 1913). This clause is as follows:

“42. To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations and to prescribe their compensation.”

In view of the fact that you have not designated the particular provisions you desire to have incorporated in such an ordinance, we have incorporated provisions having for their object the general idea expressed in the communication of Mr. Pinkerton.

The writer will gladly discuss this matter with you and take up any other provisions you may desire to include in the ordinance.

Very truly yours,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

May 1, 1914.

THE BOARD OF TRUSTEES of the Police Pension Fund of the
the City of Chicago.

Gentlemen:

There has been referred to me for an opinion, the claim for a pension of Jennie Thomas, the widow of Morgan J. Thomas, a former police officer of the City of Chicago, who died of pneumonia on March 17, 1914.

Mr. Thomas, at the time of his death, was receiving a pension for disabilities received in the year 1888, such disability resulting from a gunshot wound and other injuries received from two prisoners whom he was arresting. Shortly after the last mentioned date, Thomas was retired from the police

force and placed upon the pension roll where he remained and drew a pension until April, 1901, when for some reason not appearing upon the records of your office, he was dropped from the pension roll. On March 15, 1905, Thomas married the present applicant. In 1907 he was reinstated upon the pension rolls and continued receiving a pension until the date of his death.

As to the reason for his being dropped from the pension rolls from 1901 until 1907 the only theory which can be indulged by me is that the board determined that his injuries had ceased and consequently cut off his pension, and subsequently determined that his disability had returned and so placed him on the rolls again in 1907. For the consideration of the claim of the applicant, however, this feature is not important.

Section 4 of an act "To provide for the setting apart, formation and disbursement of a police pension fund in cities, villages and incorporated towns, etc.," in force July 1, 1909, provides that:

"Whenever any policeman of any such city * shall become physically disabled * in consequence of the performance of police duty, * * * he shall be retired from active service and paid a pension. On the death of any person so retired, the widow * * * of such deceased pensioner shall be paid the same pension herein provided for such retired husband, * * *."

We understand that some doubt exists in the opinion of the board as to whether this widow is entitled to a pension from the fact that the officer had married after the granting of the original pension in 1888. This doubt probably occurred from the language of Section 6, which provides in part that:

"Whenever any policeman of such city * * * shall * * * receive injuries from which he shall thereafter die, leaving a widow, * * * then, upon satisfactory proof of such facts made to it, such board shall order and direct that a yearly pension of one-half of the salary received by such policeman, not to exceed nine hundred dollars, and a minimum of not less than six hundred dollars per year, shall be paid to such widow during her life, * * *: *And, provided further, that whenever any policeman of such city, * * * has been*

*retired after twenty years' service, or physically disabled, shall then marry, such wife * * * shall, after his death, receive no pension from said fund. * * **

The prohibition against the payment of a pension to the widow of an officer who had married after being retired for a physical disability we think refers to an officer who had been so retired and *was enjoying the pension*. The object of this and similar statutes was to discourage the marriage of old and disabled pensioners to young women who might be induced to enter into the state of matrimony for the sole purpose of becoming the beneficiaries of their husbands' pensions at the husbands' deaths. This abuse of the pension laws was obvious in the administration of the early old soldiers' pension laws, when cases frequently arose of young women marrying old and decrepit pensioners simply for the sake of obtaining the pensions of these veterans at their deaths. To discountenance this practice, the section in question was doubtless inserted in our pension laws and in fact could be the only reason of which we can conceive for the introduction of such language. The law in general, and public policy of this state, favor marriage and do not approve of placing restrictions thereon. There would seem to be no adequate reason for imposing any obstacle in the way of disabled and retired patrolmen marrying except in the case of such patrolman being in receipt of a pension.

The officer in question was not in receipt of a pension at the time he married, his pension having been cut off for a period of four years prior to his marriage. There is no reason apparent, and none is suggested by the record, that the officer had any expectation of ever again receiving the pension which had formerly been given to him, and there is likewise no reason to suspect that the woman who married him entered into that relation for the reason that he was getting a pension at that time or with the expectation that he would ever receive a pension. If the officer so retired had after his marriage rejoined the police force and been given a pension for disability or other cause, I think there could be no doubt that he would have been entitled to a pension and on his death his widow would have succeeded to such pension.

The controlling element in the case is, whether the marriage occurred while the officer was receiving a pension or, perhaps, to go a step further, whether it was induced in the hope and expectation that the husband might receive a pension in the future. It is these contingencies which the law was passed to prevent. It is true that the bald language of the statute says that when any member of the police force has been retired, physically disabled, and shall then marry, such wife shall receive no pension, but we think this language means that whenever any member of the police force has been retired, physically disabled, and is drawing a pension and shall then marry, his widow shall receive no pension. The pension laws are somewhat remedial in their character, and as such, must receive a liberal construction, where such construction does not do violence to the plain intent of the language of the statute. We can see no difference in the present case from that above given as an illustration where a retired officer unpensioned should marry, re-engage in police duty, be retired as disabled and then receive a pension.

The paramount fact in both instances is that the marriage took place when the retired officer was not in receipt of a pension and apparently had no expectation of such pension.

The case is not entirely free from doubt, but I am compelled to the conclusion that the interpretation which I have given to the statute, under the facts in this case, would be upheld by the courts as being consonant with the intention of the legislature in framing this provision. This applicant is sixty years of age, and the officer left no children under sixteen years of age, so that the pension will cease with the death of the applicant.

The case is one of the first instance and were other cases of a similar character likely to arise in the future, I would advise that a suit be instituted for the purpose of obtaining a judicial interpretation of the language of the proviso of Section 6 hereinabove referred to, but the question is of so unusual a character that it is doubtful whether it may ever arise again and consequently in the present instance I think a recourse to the courts would be unnecessary.

I may further add that the position herein taken is

strengthened by the fact that the applicant herein is not applying for a pension under the provisions of Section 6 of the act, but under the provisions of Section 4, and the contention might be urged with some force that the prohibition against a pension to the widow of a retired, disabled officer who had married after retirement applied solely to the class of officers mentioned in Section 6, namely, those officers who received injuries from which they thereafter died, and did not apply to the class of officers comprehended in Section 4, namely, retired, disabled officers.

It would, perhaps, seem that if the legislature had intended the prohibition to be extended to the widows of officers under Section 4, they would have so indicated by placing appropriate language in Section 4, instead of somewhat artificially putting in the restriction in Section 6. A decision on this point, however, it occurs to me, is not necessary at this time, in view of the facts of this case and I express no opinion as to whether the elimination of the prohibition from Section 4 excludes all widows of officers of that class from the disability to receive a pension imposed by the language in the proviso of Section 6.

Your board will be authorized, in my opinion, in paying the applicant the pension heretofore paid her deceased husband.

Respectfully yours,

JOHN W. BECKWITH,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

May 1, 1914. .

MR. HARRY G. WILSON, Secretary, Board of Directors, Chicago
Public Library, Chicago.

Dear Sir:

Your letter of November 13, 1913, addressed to the corporation counsel has been referred to me for reply. You ask, in substance, for a new opinion from this office explaining the legal status of the Chicago Public Library Board on ac-

count of a recent decision of the Supreme Court of the State of Illinois, holding the said library board liable for the negligent acts of its servants and employes.

The decision referred to is entitled *Johnson v. City of Chicago*, 258 Ill. 494. By a previous opinion of the corporation counsel rendered on June 10, 1909, the library board was advised that it would not be liable for the negligent acts of its servants and employes in operating said library, and in substance was also advised that it would not be liable for any negligent act in which the servants of the library board were injured by one another. This opinion was based upon what was then thought the settled law, to wit: that the Chicago Public Library Board performed a governmental duty and therefore the City of Chicago acting through the library board, acted in a sovereign capacity and would not be liable for negligence; but the opinion in the Johnson case has changed that construction of the law and according to that opinion the City of Chicago operating the Chicago Public Library will be liable for the negligent acts of its servants and employes and the negligent acts of one servant with another unless the doctrine of fellow servant or assumed risk would intervene.

The court in the Johnson case recognized the fact that the Chicago Public Library did perform a governmental function, but it also decided, even if it performed a governmental function, it would be liable because the language of the statute creating the library board did not make it mandatory upon the City of Chicago to establish such library, but made it a matter of choice for the city so to do and inasmuch as the city elected to take on the responsibility of establishing a public library of its own volition, it would be liable for the negligent acts of its servants and employes acting in the line of their duties.

The court also concluded in that case that the City of Chicago, through the public library board, in the general scope of its duties to the public, was performing a ministerial duty and because it was a ministerial duty the library board would also be liable for the negligent acts of its servants and employes. The court also says that if the function performed

by the Chicago Public Library Board was in the nature of a judicial function and the negligent conduct grew out of such an act then the City of Chicago would not be liable.

The court says at page 498 in explaining the difference between a judicial act and a ministerial one:

“Official action is judicial where it is the result of judgment or discretion. It is ministerial when it is absolute, certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion. A municipal corporation acts judicially or exercises discretion when it selects and adopts a plan in the making of public improvements, but as soon as it begins to carry out that plan it acts ministerially and is bound to see that the work is done in a reasonably safe and skillful manner.”

We are unable to determine just what acts the library board might do, that are judicial and what it might do that are ministerial, hence the only safe way is to conclude that all of the acts of the library board, in the performance of its duties, are ministerial and govern yourself accordingly. This being true, under that decision the City of Chicago would be liable for the negligent conduct of its servants and employes not only to its own servants but to the public in general. This would apply to operating an elevator in and about the building or injuries caused by repairs of the building or by the operation of the library wagons in delivering its books from one part of the city to another.

We are, therefore, of the opinion that the City of Chicago on account of the operation of the Chicago Public Library will be liable, the same as any private corporation for the negligent acts of its employes and servants, and will be placed in the same position toward the public as other corporations and also the relation of master and servant will exist in the same manner.

If we conclude that the Chicago Public Library is liable as aforesaid, you ask advice as to what steps to take to secure the City of Chicago against probable damages that might arise on account of anticipated injury that may occur in the future,

where the element of damages would have to be considered on account of the servants or employes of the library board.

In this connection I desire to call your attention to the opinion of the corporation counsel rendered to the mayor and the city council of the City of Chicago, printed in the Council Journal of February 2, 1914, at page 3772. What is known as the "Compensation Act" is therein discussed and is there held "that this act gives the city an option as to whether or not it will operate under it and while its validity will also probably be attacked, yet it is generally conceded to be more comprehensive and effective than the early act."

On account of this the corporation counsel deemed it advisable that the City of Chicago should operate under the act and having failed to reject it within the time prescribed the city has become subject to its provisions since July 1, 1913, and must operate under it for the current year. This necessarily will include the Chicago Public Library.

The opinion also holds, however, after observing the operation of the law, hereafter if deemed advisable by the City of Chicago not to operate under the law after the first year, notice to that effect must be filed with the "Industrial Board" on or before November 1, 1914.

If the City of Chicago, for the library board, desires to take out indemnity insurance to protect itself against the result of negligent acts of its servants and employes, it may do so.

There is nothing farther for the library board to do except to abide by said act and a formal application electing to operate under it is not necessary.

Respectfully submitted,

A. L. GETTYS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 2, 1914.

TO THE HONORABLE, THE CITY COUNCIL, OF THE CITY OF
CHICAGO.

Gentlemen:

In response to the order passed by the City Council (see Council Journal, pp. 3692-3), directing the corporation counsel to report what authority, if any, the City of Chicago has to require the owners of passenger steamships leaving and entering the harbor of Chicago to equip such boats with requisite life saving paraphernalia and proper devices for the fighting of fire, we submit the following:

We assume that the steamships meant and intended by the above order are those operated between the harbor of Chicago and those of other cities and states. In our opinion vessels operating between various cities and states come within the operation of the interstate commerce laws of the United States. Upon this subject we desire to quote the language from McQuillan on Municipal Corporations, Sec. 771, as follows:

“Under the constitution of the United States the Congress possesses exclusive jurisdiction ‘to regulate commerce with foreign nations, and among the several states.’ Therefore, all state laws or municipal ordinances which, in effect, interfere with or constitute a regulation of such commerce, clearly violates this provision of the federal constitution, and will be declared void by the courts.”

Upon the same subject we quote the following language of the United States Supreme Court in the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203-4:

“Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on,

and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the states may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character and require uniformity of regulation affecting alike all the states, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products, and against those of other states. It was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the states was vested in Congress."

The above opinions are sustained by many decisions of the United States Supreme Court and of various states, and from all of these decisions and cases we are of the opinion that the matter of regulating the requisite life-saving paraphernalia and proper devices for the fighting of fire upon boats operating between various cities and states are subjects which are national in their character and require uniformity of regulation affecting alike all the states and, hence, the power of Congress to regulate such subjects is exclusive. The Congress of the United States have made provision by various acts for the furnishing of life-saving and fire-fighting appar-

atus on such boats. We are, therefore, of the opinion that the City of Chicago has no authority to legislate upon the subjects mentioned.

Respectfully submitted,

WILLIAM J. NAUGHTON,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 2, 1914.

TO THE HONORABLE, THE CIVIL SERVICE COMMISSION, OF THE
CITY OF CHICAGO.

Gentlemen:

In response to the letter of the secretary of the Civil Service Commission concerning the status of employes of the former Village of Morgan Park who are not members of the police and fire departments of Morgan Park, we submit the following:

At the time the said village was supposed to be annexed, after the election of 1911, an opinion was rendered by this department relating to the positions held by persons under the village other than in the fire and police departments, which was based principally on a rule of the Civil Service Commission, designated therein as Section 5 of Rule VI where specific provision was made for employes of annexed territory. This rule provided that such persons would become temporary appointees until such time as provision for the places could be made from eligible registers, resulting from examination, in which citizens of such annexed territory have an opportunity to participate.

We are unable to find this provision in your present rules, and we must therefore rely on the statute to guide us as to what should be done with the employes of the village who are now performing their duties under the jurisdiction of the City of Chicago. Section 5 of the Annexation Act provides that when such an annexed municipality has passed its annual appropriation ordinance but has not yet passed its ordinance levying a tax for the purpose of defraying the ex-

penses incurred thereby, such levy may be made by the municipality to which the same was annexed. It then says:

“The said taxes may be used by the city, village or incorporated town to which annexation is had for the purpose for which such appropriation was made by the city, village or incorporated town so annexed.”

Section 6 of the same act provides that when the tax levy has been made the tax shall be collected and the proceeds thereof shall be paid over to the municipality to which the other is annexed “to be used for the purpose for which the tax was levied.”

While Section 6 does not speak of the appropriation, it is quite plain, when the two sections are read together, that the intention was to provide for the use of the money according to the appropriation ordinance of the village if it should be required after annexation. Such being the case, it follows that where employes have been provided for under the appropriation ordinance of the village, there are new positions created in the service of the city for which the appropriation is already at hand.

We cannot assume, however, that the incumbent in each instance is automatically transferred to the city service, contrary to the provisions of the Civil Service Act, because in Section 17 of the Annexation Act express authority is conferred for so transferring policemen and firemen, and it must follow that it was not the intention of the legislature to automatically transfer other employes on the same basis. On the other hand, the incumbent should have at least an equal right to others to the position which he holds. It is entirely proper for the head of the department, under which he comes, to retain his services for the limited period permitted under the statute until an examination has been held to fill the position. It would not be fair to such an employe to fill his position from a list already in existence, since he was ineligible before annexation, and as stated above, is entitled to an equal opportunity with all others to retain same.

While we cannot point to any statute, ordinance or rule which will govern the case absolutely, we believe that a fair interpretation of the Civil Service Act and the Annexation Act

read together, would permit such employes as are now holding the new positions to remain there until a new examination is called for employes of the character and grade required therein, which they would have an opportunity to take in case there is an eligible list pending. If there is no eligible list pending, then they may occupy the positions until such time as the Civil Service Commission can call an examination and prepare an eligible list from those who take it.

All appointees of the village who were thus transferred are entitled to pay from the city beginning with April 22, 1914, that being the date of annexation. If any of them are entitled to pay for services earlier in the month of April, the City Council has authority under the Annexation Act to pay the money due them, but we would not consider it proper for the pay-roll of the city to show that they were in the employ of the city before the date of annexation. In other words, the proper course for such employes to whom money is due to pursue is to render bills for same to be vouchered by the head of the department in which they now are, and to be paid by the comptroller out of the appropriations made therefor by the Village of Morgan Park.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 5, 1914.

HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

Your letter of May 2nd, requesting the opinion of this department as to what officers in the police department should be sworn in by the secretary of your department, received.

The only oath of office required by any law or ordinance is the constitutional form of oath prescribed by Section 4 of Article 6 of the Cities and Villages Act, which oath must be filed in the office of the city clerk and not in the office of the secretary of the department of police.

Under the terms of the section referred to, every officer named in Section 1908 of the ordinance relating to the department of police as amended by the so-called ordinance for the reorganization of the police department is required to take and subscribe the oath of office to be filed in the office of the city clerk.

The Police Pension Act provides that "whenever any person shall have been or shall hereafter be appointed and *sworn* or designated by law as a probationary or regular policeman, and shall have served for a period of twenty (20) years, etc.," he shall be entitled to a pension.

We take it that the purpose of keeping an oath book in the office of the secretary of your department is to permit all persons appointed as policemen to comply with the condition of being sworn prescribed by law to entitle them to their pensions. This is because it has not been the custom of the city clerk to swear in civil service officers.

With that in mind we advise that only those persons who are designated by the ordinance as policemen be sworn in and subscribe the form of oath furnished by the secretary.

Respectfully yours,

JOS. F. GROSSMAN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

MAY 5, 1914.

TO THE BOARD OF TRUSTEES OF THE MUNICIPAL PENSION FUND,
Chicago.

Gentlemen:

We have your request of April 6th for an opinion in the matter of the right of William E. Quinn, former superintendent of sewers, to a refund of an amount equal to that contributed by him while on the pay roll pursuant to an order of court, which order was afterwards reversed on appeal.

From the records submitted to us, it appears that William E. Quinn was discharged from the service of the city on May 10, 1910, and on May 5, 1911, he was reinstated in the

service of the city upon the order of court. Pending an appeal, Quinn was on the pay roll of the City of Chicago and the sum of \$2 was deducted each month from his salary until he was again separated from the service on September 20, 1913, upon the reversal of the decision of the trial court.

Mr. Quinn claims a refund because under the decision of the court on appeal he was not entitled to be reinstated after his separation from the service in 1910 and therefore never became entitled to the benefits of the Municipal Pension Act which went into force and effect in July, 1911.

Mr. Quinn however claimed to be entitled to his position under and by virtue of the terms of the Civil Service Act and was in fact employed by the city and paid his salary by the authority of the Civil Service Act, as the trial court had construed it. We believe that it does not now lie in the mouth of Mr. Quinn to say that he was not employed under and by virtue of the Civil Service Act, during the time in question.

The only authority for the board of trustees to authorize a refund to any employe who is employed by the city under the civil service act, is upon the abolishment of his or her position before such employe shall have qualified for a pension. Mr. Quinn does not come within that class of cases and we are therefore of the opinion that he is not entitled to a refund.

Respectfully yours,

JOS. F. GROSSMAN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

MAY 5, 1914.

TO THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND,
Chicago.

Gentlemen:

We have your letter of March 11, 1914, directing our attention to the fact that on April 14, 1908, the board of trustees of the police pension fund allowed Julia McCabe, widow of Michael S. McCabe, a pension at the rate of \$750 per annum. At the time of his death Officer McCabe was a

patrolman and as such his widow is entitled to \$600 per annum, being one-half of the salary of a patrolman.

The question submitted to us is whether it is within the power of the present board of trustees to correct the error in this instance committed by a former board.

In *Eddy v. People*, 218 Ill. 611, it was held that the decision of the board of trustees of the police pension fund is final and cannot be reviewed by a subsequent board or by the court unless fraud be shown or unless the board had exceeded its powers.

In this instance we believe that the board exceeded its powers in awarding the widow of Michael S. McCabe a pension of more than one-half the annual salary of the deceased during his life time. No finding was made by the board in considering the application of the widow for a pension as to the amount of Michael S. McCabe's salary at the time of his death and hence it was not a mere error of fact.

Under the circumstances, we believe the present board has power to reduce the amount of the pension to be paid to Julia A. McCabe in the future.

Respectfully submitted,

JOS. F. GROSSMAN,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

MAY 6, 1914.

TO THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND,
Chicago.

Gentlemen:

We have before us the application of Emma Griebenow, widow of Chas. L. Griebenow, who died on February 9, 1914, while in the service of the city as a police patrolman.

The deceased was appointed as a member of the police force on August 17, 1895. On June 5, 1899, he was discharged from the city's service, but on November 25, 1908, he was reinstated by order of court upon a petition for mandamus.

Section 6 of the Police Pension Act provides:

“Whenever any policeman shall die after ten years’ service and while still in the service of such city, village or town, as a policeman, leaving a widow or child or children under the age of sixteen years, then upon satisfactory proof of such facts made to it, said board shall order and direct that a pension of one-half the salary, not exceeding the sum of nine hundred dollars, shall be paid to such widow, or if there be no widow, then to such child or children until they shall be sixteen years of age, etc.”

The deceased was in active service as a policeman nine years, seven months and twenty-nine days, or about four months less than the required ten years.

The question for us to determine is whether the time during which he was kept out of service by order of the Civil Service Commission should be counted. If it should be allowed the applicant is entitled to a pension.

The judgment of the court directing that Chas. L. Griebel now be reinstated to his position as patrolman was an adjudication that he had been unlawfully removed and under the law he had the right to his position during the time he was kept out of service.

The pension law in this instance, however, requires ten years’ *service* and not ten years of mere holding of office. Your board has heretofore placed a practical construction upon the language of the act in computing the length of service of members of the police force by deducting time consumed on furloughs or leaves of absence of over one month. The City Council of the City of Chicago in regulating its police department has adopted the same construction of the pension law and has incorporated this rule in Section 1936 of the Chicago Code of 1911 as amended, which is as follows:

“1936. Whenever the funds appropriated for the maintenance of the department of police are sufficient to permit the members thereof being given furloughs with pay, each and every member of the department of police shall be entitled to a leave of absence from duty for fifteen (15) consecutive days each year, with full pay. In every case the general superintendent of police shall designate when such leave of absence shall be taken; provided, however, that in the computation of

the total time of service of any member of the police force furloughs or leaves of absence of over one (1) month shall be excluded from such total time of service of such member of the police force."

From the foregoing it appears that the officers charged by law with the administration of the police pension fund have construed the word "service" used in the police pension act to mean *active service*. Indeed, the very purpose of pensioning policemen is to compensate them for the hazards encountered in active service.

In any event the language of the act referred to is doubtful in meaning and in such case, if a practical construction has been placed upon an act of the legislature by officers charged with the duty of enforcing or applying the statute, the courts will be inclined to adopt such construction.

Nye v. Foreman, 215 Ill. 285, 288.

Cook Co. v. Healy, 222 Ill. 310, 317.

Peo. v. Kipley, 171 Ill. 44, 77.

Peo. v. Fid. & Cas. Co., 153 Ill. 25, 39.

In this case, the period of active service of the deceased was very close to the required time, and while the case is not free from doubt, the granting of a pension in this instance will open the door to many who have been and will in the future be reinstated in the police service after long lapses of time.

We believe that the law upon this subject should be settled by the courts and therefore advise that the application in this case should be denied.

Yours very truly,
JOS. F. GROSSMAN,
Assistant Corporation Counsel.

Approved:
JOHN W. BECKWITH,
Acting Corporation Counsel.

MAY 6, 1914.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

We have your letter of April 10, 1914, asking our advice upon the subject of crediting the police pension fund and

the firemen's pension fund with portions of the revenue collected from certificates or licenses issued by the department of police to public motor vehicle operators.

Section 1 of the Police Pension Act, which provides that there shall be set apart certain moneys from sources enumerated includes:

"Eleventh. Three per cent. of all revenue collected or received by such city, village or incorporated town from all licenses issued by such city, village or incorporated town, not mentioned in this act; provided, however, that the sums so received from such three per cent. shall in no case exceed the sum of fifty thousand dollars per annum."

A similar provision is contained in Section 1 of the act creating the firemen's pension fund and is as follows:

"That in all cities, villages or incorporated towns whose population exceeds five thousand, having a paid fire department, one per centum of all revenues collected or received by such cities, villages or incorporated towns from licenses issued by such cities, villages or incorporated towns; * * * shall be set aside by the treasurer * * * for the pensioning of disabled and superannuated members of the fire department, etc."

In *Metropolitan Theater Co. v. Chicago*, 246 Ill. 20, page 23, a license is defined as,

"a privilege granted by the state directly or indirectly through the medium of a municipality, usually upon the payment of a valuable consideration, called a license fee. The license must confer authority to do something which would be illegal if done without such license. * * * License fees may be imposed for regulation, revenue or prohibition. * * * The license fee may be both for regulation and revenue."

The ordinance establishing a vehicle registry in the department of police and providing for the licensing of public motor vehicle operators by the general superintendent of police is a regulatory ordinance (see Journal of Council Proceedings, December 17, 1913, p. 3102), and the provision of the police and firemen's pension acts hereinabove quoted apply to the revenue in question. The fact that the license is issued by the department of police instead of by the city

clerk, has no bearing upon the question, as that matter is entirely within the control of the city council.

Respectfully submitted,

JOS. F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 6, 1914.

HON. EDWARD COHEN, City Collector.

Dear Sir:

In your recent letter you state that, following the annexation of Morgan Park to the City of Chicago, there has arisen a question with reference to the collection of license fees where the person applying for same paid the license fee to the Village of Morgan Park for a portion of the year and desires to pay to the City of Chicago for the balance of the year.

The above question, of course, only arises in the case of those licenses which run for the entire year and which are covered by Section 1516 of the Chicago Code of 1911, which provides that no license shall be issued for any period of time less than a year or for a less sum than the full annual license fee except where the ordinances otherwise specifically provide.

From information at hand it seems that, in contemplation of the probable annexation of the village, licenses were issued for a term ending May 1, 1914, and these parties are now applying for licenses for the remainder of the year only.

We are unable to point out a way in which you could legally accept less than the full annual license fee. To do so would be to read something into the statutes or ordinances which does not exist.

If the license issued by the village had been issued for a full year it might be said in the case of those which designated a particular place in which the business is to be carried on, that at least a moral obligation is imposed on the city to permit such business to be conducted there for the balance of the year.

Since the city gives no additional privileges to a person pursuing an occupation of this kind, it would perhaps be only fair to allow the license to stand. It is different, however, in the case of such licensees as can exercise their vocation in the entire City of Chicago, who would necessarily be materially benefited by annexation. We apprehend, however, that no such instance as we mention above can arise, because the licenses that were taken out all expired on May 1st.

So far as the relationship of the City of Chicago with such licensee is concerned, it must be regarded as an entirely new one; the license in the Village of Morgan Park having expired by the terms thereof, the party now applies to the City of Chicago just the same as any person who makes application for the first time.

This may be a hardship, but there appears no other way in which the provisions of the ordinance can be lawfully avoided. It has happened frequently that valuable rights have been lost through annexation. It was held in the case of *The People v. The Chicago Telephone Company*, 220 Ill. 238, that perpetual grants of an annexed municipality expired with the municipality, although where the term of the grant was limited the city would be bound to carry out the contract with the grantee.

While the rule thus laid down is a harsh one it had the sanction of high authority before the decision referred to was rendered.

I. C. R. R. Co. v. City of Chicago, 176 U. S. 646.

Ind. Ry. Co. v. Hoffman, 160 Ind. 601.

It will, therefore, be necessary to collect the license fee for the entire year in all cases where the Code does not provide for pro-rating.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

MAY 8, 1914.

COLONEL W. V. JUDSON, United States District Engineer, Federal Building, Chicago, Ill.

Dear Sir:

Complying with your request made orally to me on May 6, 1914, I write you in regard to the proviso contained in Section 21 of the Illinois Harbor Act of June 23, 1913. The entire section is as follows:

“§21. All laws and parts of laws heretofore enacted conferring or granting police control or other power or jurisdiction upon any municipal corporation other than a city or village within the area or districts that may be particularly described by ordinance as in this act provided and authorized, are hereby repealed: *Provided*, that nothing herein contained shall be construed to or shall repeal an act entitled ‘An Act to amend an act entitled, “An Act to enable park commissioners having control of a park bordering upon public waters in this state, to enlarge and connect the same from time to time by extensions over lands and the bed of such waters and defining the use which may be made of such extensions and granting submerged lands for the purpose of such enlargements,” approved May 14, 1903, in force July 1, 1903, and to amend the title thereof and to repeal the act herein named,’ approved June 11, 1912, in force July 1, 1912.”

The proviso saves the repeal of an act which was approved June 11, 1912, in order to enable the South Park Commissioners to settle boundary line disputes and acquire riparian rights from shore owners in the district between Grant and Jackson Parks and to confer upon said commissioners full power of condemnation. The act is a revision of prior acts conferring the two additional powers just enumerated. I am quite familiar with the law, since I drafted the bill myself.

Answering your inquiry as to whether this statute confers any power or authority upon the Lincoln Park Commissioners, I beg to state that it does not for the following reasons:

First, the state legislature has power to confer upon any of the subordinate municipal corporations created by the state the right to use the submerged lands for public pur-

poses in trust for the entire people. The City of Chicago acquired first right to the submerged lands in harbor district No. 1 by the passage of the ordinances creating said district on November 20, 1911, and July 28, 1913. The Lincoln Park Commissioners have never acquired any rights in harbor district No. 1 east of Lake Shore drive, with the exception of 50 feet of submerged lands lying immediately east of the breakwater protecting said drive, and police jurisdiction over the waters of Lake Michigan east of said drive for a distance of 250 feet. As pointed out in our conversation and in previous correspondence upon this matter, the city acquires, under Section 14 of the Harbor Act, the right to cross by roadways or other appropriate approaches, the ways, drives, boulevards, beaches, wharves, docks, levees, piers, breakwaters, retaining walls, lands and submerged lands, or any of them, of any municipal corporation (other than city or village) which includes park commissions; and as to the police control over the waters of the lake for a distance of 250 feet, that is repealed by the portion of Section 21 preceding the proviso referred to.

Second. The Lincoln Park Commissioners in their reclamation of submerged lands to create additional park areas, act under a separate set of statutes passed by the legislature which are different in some respects from the act referred to and under which the South Park Commissioners act. They have never taken any steps to acquire jurisdiction over, or title to the submerged lands other than in the two particulars above referred to, in which respects the rights were conferred by the act of June 4, 1889.

Third. The Harbor Act, being a later enactment than the act referred to in the proviso to Section 21, and being later than any of the acts conferring power and jurisdiction upon the Lincoln Park Commissioners, operates as an implied repeal of any acts or portions of acts inconsistent with the city's rights to construct harbor improvements, and by reason of this and the passage of the two ordinances above referred to, the city has acquired and now enjoys priority of right in harbor district No. 1.

Fourth. There is nothing contained in the act referred

to in the proviso of Section 21 of the act which can or does confer any priority of right upon the Lincoln Park Commissioners, and there is nothing in said act obstructive of the right of the City of Chicago to proceed at once with its harbor development.

The above, I believe, fully covers the points we had under discussion and answers the inquiry raised in that respect by the communication from the Secretary of War.

Respectfully submitted,

JAMES G. SKINNER,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

MAY 11, 1914.

HON. RAY PALMER, Commissioner of Gas and Electricity.

Dear Sir:

In your letter of recent date concerning inspections and license fees in connection with the bureau of electrical inspection, you call attention to the ordinance of July 17, 1913 (Council Journal, page 1242) and ask whether the provisions of same apply to the electrical wiring and repairs by employes in the bureau in your department which has charge of same. You state, among other things, that this bureau does work for your department and other departments of the city government, and issues warrants for the collection therefor, and the question has arisen as to whether or not the men employed are required to register under the terms of Section 831½ of the Code.

You also state that the bureau of operation and maintenance of electric lights and fire and police alarm lines does some extraordinary work for other departments and even for outside firms in emergencies, and that the same question has arisen with reference to that work.

You further make inquiry as to whether or not permits should be secured from the bureau of electrical inspection, and whether warrants for collection should be issued to cover inspection charges.

So far as the registering of the men who do this class of work is concerned, we are of the opinion that this should be done.

It is the practice of the city, generally, to require its employes to conform to the standards and qualifications required by ordinance in all departments. Thus, stationary engineers and boiler tenders, plumbers and chauffeurs in the city's service are required to be licensed. In some instances this is disposed with by making a classification of public and private employes of the same character, as in the case of scavengers. As far as we are able to judge, the rule is adhered to in all instances where the issuance of the license is a certificate of competency or qualification on the part of the licensee. Gauged by this rule, there is every reason why the men employed in the bureaus in question should be registered.

On the other point, as to whether permits should be secured from the bureau of electrical inspection and warrants to cover inspection charges should be made, we are unable to find any justification for that except in those cases that you speak of where emergency work is done for private parties.

It is true that it has been the practice in the building department to require permits to be taken out and the regular fee paid for construction work done for the city. But that is exacted from the contractor, who is supposed to be held in check by reason of same.

In some cases permits without fees are issued to the city's workmen, but of course that is done more to keep a record than for any other purpose. For instance, in the water pipe extension bureau a permit is always secured by the city's workmen for the purpose of tapping a water main, but no fee is required. It may serve a useful purpose to follow this practice in the case of making electrical inspections. But we see no object in exacting fees except in the case of the work for private parties mentioned by you.

There being no ordinance governing the matter, we are

advising you on these points in accordance with the methods pursued in other departments.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

MAY 11, 1914.

TO THE HONORABLE, THE CITY COUNCIL, OF THE CITY OF
CHICAGO.

Gentlemen:

In compliance with the resolution of your honorable body passed at its meeting held May 4, 1914, calling upon this department "to prepare and submit to this council information as to whether, in view of the facts presented in said report (of Barrow, Wade and Guthrie) it is possible for the city legally to remove the members of said board of supervising engineers from office," we advise you as follows:

The question concerning which you wish to be advised is controlled by Section 34 of the ordinance of February 11, 1907.

In so far as the city, acting on its sole initiative, and without judicial intervention, has power to remove the member of the board appointed by it is concerned, the ordinance provides:

"The said city or the company may respectively, at any time and from time to time, remove its representative on said board, and may also respectively from time to time, appoint an engineer to represent it upon said board, whenever and as often as it shall fail to have a representative upon said board from any cause whatsoever. No such removal or appointment shall take effect until written notice thereof has been given to the other party by the party making such removal or appointment."

From the foregoing it will be observed that the city is possessed of plenary authority to remove its representative on the board whenever it sees fit so to do, and no reason need

exist or be assigned for the exercise of its power in that regard.

From the foregoing provision it is also equally apparent that the company is possessed of the same right with reference to removal of its representative on the board as is possessed by the city concerning the removal of its representative. It is also very clear from a perusal of the language of Section 34, above referred to, that there is nothing therein contained which confers upon the company, on the one hand, power to remove the city's representative on the board, or which confers power upon the city, on the other hand, to remove the company's representative on the board. •

When the city has properly determined to remove its representative, the only requirement with which it must comply, in order to make such removal effective, is to serve upon the company notice in writing of such removal.

Another question concerning which you wish to be advised, viz., the power of the city to remove the third member of the board, is controlled by that portion of Section 34 of the ordinance in question which is as follows:

“The said city and the company may, at any time and from time to time, remove the third engineer from said board, and may also select and appoint a third engineer to be a member of said board, whenever and as often as a vacancy in said board shall occur from the death, resignation, removal, refusal or inability to act of the third engineer upon said board.

In the event that any vacancy in the position of third engineer upon said board shall not be filled by the selection of a third engineer by said city and the company within thirty (30) days after such vacancy shall arise, then the persons then acting as judges of the (main) Appellate Court for the First District of Illinois, or a majority of them, may fill such vacancy on said board by appointing a competent engineer thereto upon the application of said city or the company, after ten days' written notice having been given to the other party of such application.

In case either the said city or the company shall at any time desire the removal of the third engineer and the appointment of another engineer in his place, the party desiring such removal and new appointment may, upon giving ten (10) days' written notice thereof to the

other party, apply to the said judges for such removal, and the said judges or a majority of them shall within ten (10) days from and after such application set the same for informal and summary public hearing at which the party desiring the removal shall publicly present its reasons for making such removal.

Upon such application of either the said city or the company, the said judges or a majority of them shall have the power, but shall not be required to remove the said third engineer. The third engineer shall not be removed by the said judges or a majority of them at any time, except upon the application of either the said city or the company.

Upon the refusal or failure of the said judges then constituting the (main) Appellate Court for the First District of Illinois, or a majority of them, to make the appointment herein authorized within thirty (30) days after being requested so to do, either the said city or the company may, upon giving ten (10) days' written notice to the other party of its intention so to do, apply to any judge of the Circuit Court of Cook County, Illinois, for the appointment of a third engineer to fill any vacancy existing in said position, and the judge so applied to shall have the power to appoint such third engineer, who, when appointed, shall be a member of said board, and shall be subject to removal in the manner hereinabove provided.

Either the company or the city shall have the right to apply to any court of competent jurisdiction for the removal of any member of said board of supervising engineers for fraud, corruption or failure to perform in good faith his duties under this ordinance."

From the first paragraph last above quoted it will be seen that the city and the company, acting jointly, are clothed with no broad power to remove the third member of the board as is either the city or the company possessed of concerning the removal of the member appointed by it, but it will be observed, however, that the concurrence of both the city and the company is requisite to such removal unless the third engineer is to be removed by judicial proceedings by either of the two methods hereinafter more specifically referred to.

Under the provisions of Section 34, last above referred to, if the city and the company cannot agree upon the appointment of an engineer to fill any vacancy in the position of third engineer, and said failure shall continue for thirty

days after such vacancy shall have arisen, then the persons acting as judges of the Main Appellate Court of the First District of Illinois, or a majority of them, may fill such vacancy by appointing a competent engineer, upon the application of either the city or the company after ten days' written notice of such application having been given to the other party.

It is thus seen that the third engineer may be removed and his place filled by the concurrent action of the city and the company; or if the city and the company concur in the removal but do not concur in filling the vacancy occasioned by such removal, then the Appellate Court may fill such vacancy.

It is also apparent that Section 34 provides that in case either the city or the company shall at any time desire the removal of the third engineer and the appointment of his successor, the party desiring such removal and appointment to be made, upon giving ten days' written notice to the other party, may apply to the judges of the Main Appellate Court, and said judges, or a majority of them, shall within ten days after such application, set the same for an informal and summary public hearing, at which hearing the party desiring the removal shall publicly present its reasons for asking such removal, and upon such hearing said judges, or a majority of them, shall have the power, but shall not be required to remove the third engineer.

We construe the language of Section 34, to which we have just referred, to confer upon the judges of said Appellate Court power to remove said third member, upon the application made as aforesaid, whenever, in their judgment, sufficient cause for such removal is shown to exist.

It is apparent from the language of Section 34 that the city and the company contemplated the possibility of the judges of the Appellate Court, or a majority of them, failing to act in the premises in so far as the appointment of the third engineer was concerned, and there was, consequently, inserted in Section 34 a provision that in case the Appellate judges, or a majority of them, should refuse or fail for thirty days to make an appointment to fill such vacancy, then, upon giving ten days' written notice to the other party, either

party might apply to any judge of the Circuit Court of Cook County for the appointment of the third engineer, and the judge so applied to shall have power to appoint such engineer.

We find in Section 34 the following language, to wit:

“Either the company or the city shall have the right to apply to any court of competent jurisdiction for the removal of any member of the said board of supervising engineers for fraud, corruption or failure to perform in good faith his duties under this ordinance.”

It seems that under this provision the city could apply to any court of competent jurisdiction for the removal of any of the three members of the board of supervising engineers, and if it could prove, to the satisfaction of the court so applied to, that any member of said board has been guilty of fraud, corruption or failure to perform in good faith his duties under said ordinance, the court, by the language above referred to, is vested with power to remove any such engineer found guilty of such delinquency.

There is no provision in the ordinance pertaining specifically to the manner in which a vacancy, occasioned in the manner last above referred to, may be filled.

We are of the opinion, however, that if the engineer appointed by one of the parties were to be so removed, the party appointing him would have the power to fill the vacancy occasioned by his removal.

If the third engineer were to be removed by either of the judicial proceedings provided for in Section 34 and the parties could not agree upon his successor, we are of the opinion that the vacancy could be filled by the judges of the Main Appellate Court and if they or a majority of them failed to act, then, on application any judge of the Circuit Court of Cook County could fill such vacancy.

The question of the power to fill a vacancy caused by a removal is a natural corollary of the question of the power to remove and we have, therefore, advised you concerning the procedure by which a vacancy occasioned by a removal may be filled.

This brings us to a consideration of the facts as presented in the report rendered by Barrow, Wade and Guthrie.

We shall not consider all the facts to which the report makes reference, but will take up sufficient thereof to enable your honorable body to understand the manner in which the board of supervising engineers has done the work entrusted to it insofar as the accounting features thereof are concerned.

ITEMS CHARGED TO CAPITAL ACCOUNT THAT SHOULD BE
CHARGED TO OPERATING EXPENSE.

At pages three and four of the report we find a number of items aggregating \$144,992.42, which are charged to capital account. Here we find making up this amount such as:

“Proportion of salaries; officers (E. R. Bliss, one-half salary)	\$ 3,000.00
Heads of departments.....	\$8,098.61
Clerks	86,930.00
Proportion of the expenses of the board of supervising engineers and the engineering organization in connection therewith.....	\$ 2,261.69
Proportion of overhead expense, maintenance of way and structure.....	3,572.25
Maintenance of equipment.....	4,825.63
Operation of power plant.....	24,692.75
Operation of cars.....	1,257.60
	\$34,348.23
Less charged to renewals, etc.....	\$ 3,874.61
Bal.	\$30,473.62
Store room expenses.....	\$47,255.32
Printing and stationery.....	2,102.47
Miscellaneous office expenses.....	7,518.27
Miscellaneous general expenses.....	7,696.14
Other legal expense.....	3,543.34
Rent of land and buildings.....	273.69
Rent of tracks and terminals.....	2,631.10

There are other items making the total above referred to which it is not necessary to mention, as those mentioned illustrate the subject now under discussion.

To this item of \$144,992.42 is added the sum of \$21,748.86, being fifteen per cent. thereof.

The question of the propriety of charging the items in question to capital account is controlled by Section 7 of the ordinance of February 11, 1907. That ordinance provides in part: "During the three year period of 'immediate rehabilitation' seventy per cent. of the gross receipts shall be set apart and shall be used so far as required in defraying the operating expense, including maintenance and repairs, and the residue of said seventy per cent. shall be applied to the cost of renewals and no part of the cost of any renewal paid for out of such seventy per cent. shall be charged to additional capital, and all expenditures for renewals during said three years in excess of said residue of seventy per cent. shall be charged to capital account.

After such three year period of "immediate rehabilitation" the cost of renewals shall be paid as provided in Section 16 hereof, but such expenditures (and only such expenditures) as are made for the purpose of extensions or of additions to property shall be thereafter considered as additions to capital, provided, however, that in the replacement of any principal part of the property, either existing or hereafter acquired, there shall be charged to capital the excess amount that the new property cost over the original cost of the property displaced," etc.

We believe that the language last quoted is a prohibition against the charging of the major portion of the items in question to capital account. So far as the items of payments to officers and attorneys are concerned, it would seem that Section 19 of the ordinance of February 11, 1907, directs that such items be charged to operating expenses, and by implication prohibits the charging thereof to capital account. Said section provides in part as follows:

"The company may pay to the directors, officers, agents and attorneys of the company *as a part of the operating expenses*, compensation for their services commensurate with the services actually rendered by them," etc.

So far as the item of "proportion of expense of the board of supervising engineers and the engineering organization in

connection therewith," amounting to \$20,361.69, is concerned, it would seem that the charging thereof to capital account is in express derogation of Section 34 of the ordinance of February 11, 1907. That section provides in part as follows:

"The said board of supervising engineers shall maintain an office in the city and shall employ the necessary assistants and purchase the necessary supplies and materials to enable it to properly perform its duties under this ordinance. * * *

The salaries and expenses of said board of supervising engineers during the period of "immediate rehabilitation" provided for in this ordinance shall be added to and form a part of the cost of such "immediate rehabilitation" but thereafter *shall be paid out of gross receipts as an operating expense.*"

It probably cannot be said that all of the members of the board of supervising engineers sustain a fiduciary relationship to the city within the general meaning of that term. It cannot admit of dispute, however, that one member of said board appointed by the city sustains such fiduciary relationship to the city and certainly, to a limited extent at least, the third member of the board sustains such relationship to the city. As to such third member there certainly exists the duty to show no favoritism to either the company or the city. The prime, if not the sole, purpose of the city, in selecting one of the members of said board, is to obtain from such member in the discharge of his duties, such a high degree of zeal and such careful guardianship of the city's rights and interests as would not be expected in business dealings in the ordinary affairs of life between two persons who are dealing with each other at arms' length. The city's representative on the board is its trusted, confidential agent placed on the board for the express purpose of thwarting any action on the part of either of the other members of the board which might be considered detrimental to the city's interests.

The question for determination is, have the persons who are obligated to exercise toward the city an extraordinary degree of good faith, discharged that obligation.

The report leads us to the certain conviction that more than one member of the board has been recreant to the trust

imposed in him by the city and that in directing, authorizing or permitting charges of the nature of those in question to be made to capital account instead of operating expenses, are guilty of a failure to perform in good faith their duties under the ordinance of February 11, 1907.

The evil consequences of a system whereby the company is permitted to charge to capital account items which should be charged to operating expense, are in part as follows:

1. If the system could be carried on extensively, it would increase the capital account to such an extent that neither the city nor any prospective purchaser of the railway system in question would for a moment think of acquiring the system at the price that it would be required to pay therefor under the terms of the ordinance, because all of the items that are chargeable to capital account are added to the original valuation of \$21,000,000.00 which was placed upon the property of the company at the time of the passage of the ordinance in question, and as is quite apparent, the purchase price would be correspondingly reduced if the items in question were charged to operating expenses, as items so charged are not taken into consideration in fixing the purchase price.

2. Where the city or any prospective purchaser would further lose by the objectionable method of charging to capital account that which should be charged to operating expense, is evidenced by adding to the \$144,992.42, fifteen per cent. thereof, or \$21,748.86, which is also charged to capital account, and which fifteen per cent. is properly chargeable to capital account if the \$144,992.42 is properly chargeable to capital account, because Section 7 of the ordinance of February 11, 1907, provides that when expenditures are properly made which are chargeable to capital account, "and to the actual amount paid by the company in and about the carrying out each of the requirements of this section shall be added ten per cent. of such amount as a fair and proper allowance to the company for conducting said work and furnishing said equipment, and five per cent. for services in procuring funds therefor including brokerage." It is thus seen that it is to the company's financial advantage to be permit-

ted by the board of supervising engineers to charge to capital account that which the ordinance provides shall be charged to operating expenses, because when such charge is made to capital account the company may add fifteen per cent. thereto, whereas if the charge is made to operating expense, no additional percentage can be added. It is thus seen that, if the items in question should be charged to operating expense, the charge is \$144,992.42, but if they may be charged to capital account, then the sum of \$166,741.38 may be charged for the same items.

3. Furthermore, if the items are chargeable to operating expense, the company is not permitted to charge interest on the item of \$144,992.42, but if the items in question are permitted to be charged to capital account, then in addition to the amount expended and the fifteen per cent. added thereto, it may charge on the sum thereof five per cent. interest per annum.

So that the question under consideration may be properly understood, it must be borne in mind that if the item of \$166,741.28 which has been charged to capital account were not so charged, then there should be charged to operating expenses, \$144,992.42, which would decrease the city's fifty-five per cent. of the net earnings to the amount of approximately \$80,000.00, but that does not begin to offset the loss to it as purchaser, if the method of accounting complained of is to be sanctioned. But, we are not primarily interested in who gains or who loses by the system complained of. The question primarily is, are the board of supervising engineers enforcing in good faith the plain terms of the ordinance which they are by that same ordinance required to enforce. For a further discussion of the facts pertaining to the question now under consideration, your attention is invited to pages 3, 4, 5 and 6 of the report in question.

MONTHLY CERTIFICATE OF EXAMINATION.

Section 7 of the ordinance of February 11, 1907, provides in part: "The Board of Supervising Engineers shall on or before the 15th day of each month make a report in writing dated the first day of such month to the City Comptroller

of the amount of money actually expended during the previous month by the company, with the approval of said Board of Supervising Engineers, in and about the carrying out of the requirements of this section, together with the percentages of such amount in the next preceding paragraph provided for, and of all amounts contributed by the company to the cost of said subway system or extensions thereof, together with 5 per cent. of the amounts so contributed; and the interest, provided in Section 21 hereof as a deduction for gross receipts, shall begin to run upon total the amount of each such certificate from and after the date thereof." The evil consequences of an erroneous or false certificate can best be understood by the next succeeding paragraph of Section 7 which provides: "The total amount so certified by the said Board of Supervising Engineers (including such additional percentages thereof as hereinbefore provided) shall be final and binding upon both parties hereto and shall be conclusively held and taken as the cost of the said construction, reconstruction, equipment, re-equipment, extensions and additions to plant and property, including the subways, underground trolleys, new lines and other additions to plant and property which shall be paid by the said city upon the taking over of the said street railway system as in this ordinance provided, except that said Board may at any time within sixty days after the date of any such certificate, correct any error or omission therein." In this connection, your attention is invited to certificate number 158, dated December 1, 1913, whereby said Board of Supervising Engineers certified in part that: "(a) The amount of money actually expended by the Chicago City Railway Company during the month of November, 1913, and paid by the company previous to the 15th day of December, 1913, with the approval of said Board of Supervising Engineers out of new and additional capital funds supplied by the company (and not out of receipts of the said railways) in and about the carrying out of the requirements of Section 7 of said ordinance, was \$200,000."

Your attention is further directed to certificate No. 161 which is a certificate issued by the Board of Supervising Engineers for the sole purpose of correcting the certificate No. 158.

The force of the correcting certificate is to add to the original certificate the sum of \$32,232.42. The report of Barrow, Wade and Guthrie shows that at the time that the certificate 158 was made, the amount of said certificate had not been paid, so that the statement in the certificate contained to the effect that the amount of money mentioned was actually expended is shown by said report to be false. On this assumption then, the Board are, by their certificate enabling the company to charge interest on money which it has not expended.

It will be noted that the certificate also recites that the money so certified to have been paid was expended out of new and additional capital funds supplied by the company (and not out of the receipts of said railways) whereas the report shows, page 2, that, "As a matter of fact, the company furnished no funds whatever during the year under review, as will be seen by reference to Schedule K." This report, therefore, also shows certificate No. 158 to be false in the particular last referred to.

By the certificate in question the Board assume to state a fact or facts known to them to be true. If they knew the truth and certified to the contrary thereof, their conduct in that regard was a fraud upon the city. If, on the other hand, they did not know that what they certified to was false, but on the contrary, certified to facts of which they had no knowledge, then they acted with a reckless disregard of the truth in which instance each would be guilty of a "failure to perform in good faith his duties under the ordinance." The injury to the city would be the same whether the certificate was known to its makers to be false or was only the result of negligence. The purpose of creating the board was to have men competent to learn the facts become conversant therewith, and being conversant, certify thereto. A failure to become conversant with the facts to which the certificate pertains would be a neglect of duty.

If the certificate in question is false in the particulars indicated by the report, it is our opinion that the members of the Board of Supervising Engineers making it would be subject to removal under that paragraph of Section 34 of the ordinance of February 11, 1907, which provides: "Either

the company or the city shall have the right to apply to any court of competent jurisdiction for the removal of any member of said Board of Supervising Engineers for fraud, corruption, or failure to perform in good faith his duties under this ordinance," or the members of the board who are guilty of the delinquencies complained of might be removed by an application to the main Appellate Court of Illinois for the first district, in the manner referred to in the earlier pages of this opinion.

It is the claim of Barrow, Wade and Guthrie that the funds which are certified by certificate No. 158 to have been actually expended out of new and additional capital funds supplied by the company (and not out of receipts of said railways) were, in fact, taken out of gross receipts, which under the terms of the ordinance were on deposit and according to the accountants drawing 2 per cent. per annum. The effect of the action complained of would be to permit the company to use money on which it would charge itself 2 per cent., and in turn charge the city 5 per cent. for procuring it, when it never, in fact, procured it at all but had it in the bank all of the time, and to charge in addition thereto 5 per cent. per annum against the city for what it was charging itself 2 per cent. per annum for.

ERRONEOUS CHANGE TO RENEWALS.

Section 16 of the ordinance of February 11, 1907, provides for the creation of a renewal fund and provides: "Out of the said fund the Board of Supervising Engineers shall from time to time authorize the payment by the company of such amounts as are necessary to pay for renewals of the said *street railways and property*." This section further provides that in case of the purchase by the city, any amount in the renewal fund shall become the property of the city.

At page 9 of the report occurs the item following: "Proportion of payment to Commonwealth-Edison Company for power under contract dated 1st of June, 1908, \$199,277.74." It is thus seen that the Board of Supervising Engineers have sanctioned the charge to "renewals of the said street railways and property" the sum of \$199,277.74 on account of money

paid to the Commonwealth-Edison Company for power. For our own part we are not able to comprehend how power furnished by the Commonwealth-Edison Company to the Chicago City Railway Company, concededly for the purpose of operating cars, tends in the slightest degree to renew the *street railways and property of that company*. This is particularly true in view of the fact that the company generates none of the power that it uses and operates no power plants whatsoever. If, during the life of this ordinance, annual charges of this kind were tolerated, it would deplete the renewal fund to the amount of approximately \$4,000,000.

It will be noted in this connection that this \$4,000,000 would become the property of the city if it became the purchaser of the railway system of the company at the end of twenty years.

The item in question, if not charged to renewals, should be charged to operating expense, thereby decreasing the net earnings of each year, which are subject to division between the city and the company on the basis of 55 per cent. and 45 per cent. respectively. It is, however, perfectly plain that while the city, during the term of the ordinance, loses 55 per cent. of approximately \$4,000,000 by the correct method of accounting, it, on the other hand, gains 100 per cent of \$4,000,000 in case it purchases the railway system of the company at the end of twenty years—a loss to the city of \$1,800,000, which amount also represents the gain of the company.

THE QUESTION OF THE RESERVE FOR DAMAGES.

At pages 12 and 13 of their report the accountants make the contention that the balance remaining in the fund accumulated to provide for damages is too small, the amount thereof being \$196,297.74, whereas the statement of the Claim Agent of the company shows that the amount requisite to cover this same item is \$265,000. If this contention is correct, the Supervising Engineers are derelict in their duty in that they do not require the accumulation of a sufficient reserve to take care of the claims in question.

INCOME TAX PAID ON BOND INTEREST COUPONS.

The report also complains of the payment, sanctioned by the Board of Supervising Engineers, of the sum of \$7,450.10 out of gross receipts and charged to taxes on account of money which the company has paid for income tax on bond interest coupons. Section 24 of the ordinance of February 11, 1907, specifies the items which the company is permitted to charge up against the gross earnings, and the only possible items specified which could be made a pretext for the charge in question is, "All amounts paid out for taxes and assessments levied and imposed *upon the real and personal property of the company, including all capital stock and franchise taxes, etc.*" It is manifest that the item in question is paid for a tax levied upon the income derived by holders of the company's bonds. Those bonds are the property of the bondholder and are not either the *real or the personal* property of *the company*, nor is the tax a capital stock or franchise tax. Furthermore, if the company in obtaining money on the bonds in question obligated itself to pay the income tax thereon, it was amply compensated therefor by the payment to it of 5 per cent. for procuring such funds.

It seems manifest to us that in approving of the charge in question the Board of Supervising Engineers did not give due regard to the rights and interests of the city under the ordinance of February 11, 1907, and as the persons who are charged with safeguarding the city's interest under the terms of the ordinance, they failed to perform in good faith their duties.

We have had neither the time nor the opportunity to make any investigation of our own of the facts, but are basing our conclusions solely upon the report of Barrow, Wade and Guthrie, but based on said report, our opinion is that the members of the Board of Supervising Engineers may be removed, under the terms of the ordinance of February 11, 1907.

We transmit herewith, copies of the reports of Barrow, Wade and Guthrie, also copies of Supervising Engineers' cer-

tificates Nos. 158 and 161, which have been transmitted to us by the city comptroller.

Very truly yours,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

MAY 11, 1914.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Concerning your power to remove the city's representative on the Board of Supervising Engineers, we beg to advise you as follows:

It is a general proposition that the power to appoint carries with it the power to remove.

McQuillan on Municipal Corporations, Sec. 551.

Mecham's Public Offices and Officers, Sec. 445.

Dillon, Municipal Corporations, Sec. 473.

Venable v. Board, 40 Oregon 458.

Power to appoint the city's representative on the board in question is found in Section 34 of the ordinance of February 11, 1907, which provides that said appointment shall be made by the mayor and shall be subject to the approval of the city council. It does not follow from this provision of the ordinance, however, that the removal of the city's representative on the board is subject to the approval of the city council. Speaking on this subject McQuillan at Section 558 says:

"The fact that appointments of persons to offices require the approval or confirmation of another officer or tribunal does not mean that the latter must concur when the power of removal is exercised by the appointing authority."

The author cites in support of his dictum:

Parsons v. U. S., 167 U. S. 324.

In re Hennen, 13 Peters (U. S.) 230.

Newson v. Cocke, 44 Miss. 352.

And the cases cited support his conclusion.

If the statutes of this state do not apply to and control the matter under discussion it seems clear that you have the power to remove the city's representative on the Board of Supervising Engineers without the approval or consent of the city council.

Let us now consider what force the statute may have in the premises. Section 20 of Chapter 24, Hurd's R. S. provides:

"The Mayor shall have power to remove any officer appointed by him, on any formal charge, whenever he shall be of the opinion that the interests of the city demand such removal, but he shall report the reasons for such removal to the council at a meeting to be held not less than five days nor more than ten days after such removal; and if the Mayor shall fail, or refuse to file with the City Clerk a statement of the reasons for such removal, or if the council by a two-thirds ($\frac{2}{3}$) vote of all of its members authorized by law to be elected, by yeas and nays to be entered upon its record, disapprove of such removal, such officer shall thereupon become restored to the office from which he was removed; but he shall give new bonds and shall take a new oath of office. No officer shall be removed a second time for the same offense."

It may be a question whether or not a member of the Board is a municipal officer. If he is not then of course the section of the statute just quoted manifestly does not apply, but for the reason that we are about to suggest it is not necessary to decide the question under discussion, at this time.

The Supreme Court of this State in *People, etc., v. Healy*, 231 Ill. 629, held that the section to which we have made reference applies only to officers appointed pursuant to the provisions of the Cities and Villages Act and that it did not apply to appointments made under any other act. Clearly the appointment of the city's representative on the Board is not made under the terms of the Cities and Villages Act but on the contrary it is made by virtue of the ordinance of February 11, 1907. We conclude therefore that the section of the statute in question has no bearing on the subject under discussion and therefore as above suggested you are vested with plenary authority to remove the city's representative on the Board of Supervising Engineers without the approval or consent of the council and that the council are without authority

by a two-thirds (2/3) vote, or otherwise, to interfere with such removal.

Yours respectfully,

CHARLES M. HAFT,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

MAY 12, 1914.

HON. JOHN A. REICHERT, Chairman, Committee on Finance.

Dear Sir:

We have your communication of the 7th inst., enclosing copy of council order passed March 2, 1914, directing the commissioner of public works to issue a voucher in favor of Kusel & Harris for \$39.50, the amount charged for water on unused building permit, which order was rescinded and referred to the committee on finance March 16, 1914, together with building permits, reports and correspondence in the claim of Kusel & Harris for refund of building permit fee, and requesting the corporation counsel for an opinion "as to the city's standing in the matter."

It appears that on October 1, 1913, claimant applied to the building department for and obtained a building permit, No. A-17147, for the erection of an apartment building on the premises located at 4701-11 Sheridan Road, paying therefor \$44.40 for building and \$39.50 for water, a total of \$83.90; and on the same date applied to the health department for and obtained a permit, C-53109, for same premises, paying therefor \$41.75—a total for building, water and inspection fees of \$125.65.

Claimant did not proceed to erect a building pursuant to the permit, awaiting a decision of the Supreme Court of Illinois, affecting a section of the building ordinances which might and did enable him to obtain a permit for a different type of building on the said premises, which he obtained and paid for in the usual manner.

On January 5, 1914, claimant wrote to the city clerk giv-

ing substantially the foregoing statement of facts and asking for a refund of the amount paid for first permit, viz.: \$125.65.

On February 26, 1914, claimant wrote to the chairman of the finance committee enclosing a copy of his letter to the city clerk and iterating his request of January 5th for a refund of the full amount paid for the first permit.

Although the claimant demanded a refund before the expiration (six months) of the permit, we consider his actions in the premises an abandonment thereof.

We are of the opinion that in an action at law claimant could not recover the amount of the fees paid by him for said permit for the reason that the payments were voluntarily made under no mistake of fact, without fraud or duress. (Am. & Eng. Ency. of Law, p. 215, *et seq.*, Note 18.)

The facts of the case, however, constitute equities in favor of the claimant, and the city council has the right to take such action as it may deem proper in the premises.

We herewith return enclosures accompanying your letter.

Yours very truly,

GEO. B. O'REILLY,

Assistant Corporation Counsel.

Approved:

J. W. BECKWITH,

Acting Corporation Counsel.

MAY 13, 1914.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In response to your inquiry regarding the circumstances under which the City acquired the garbage reduction plant of the Chicago Reduction Company, we beg leave to submit the following:

On July 10, 1913, the Chicago Reduction Company addressed a letter to the mayor and the Committee on Finance containing three alternative propositions, designated as A, B and C respectively.

Proposition A contemplated a new contract for a full period of five years. It included an offer to make certain alterations and the compensation asked was \$30,000 per year,

and in addition to same the city was to furnish approximately 2,000,000 gallons of water each 24 hours.

Proposition B was an offer of a contract for five years at \$47,500 per year, in which the company offered to install the machinery and apparatus enumerated in proposition A, but gave the city the option of terminating the same at the end of three years, and in that event it was to pay the company the amount of money expended by it for the installation of the machinery, buildings and apparatus, which was to be added to the equipment.

Proposition C was an offer to sell, and was in the following language: "C. We are also willing now, or at any time during the pendency of a contract entered into with us, to sell and dispose of to the City of Chicago, said plant and all of its apparatus, including the real estate, at an appraised valuation, one (1) appraiser to be selected by said Chicago Reduction Company, one (1) appraiser to be selected by the City of Chicago and the third (3rd) to be selected by the two (2) appraisers so selected."

After further negotiations, and when it became apparent that the Finance Committee favored the purchase of the plant, representatives of the company appeared before that body and stated that the appraisal was to be made on the basis of the plant being a going concern.

While there was no formal action taken with regard to that modification of the original proposal it was so far acquiesced in by the Finance Committee that negotiations were continued and this resulted in an ordinance being passed by the city council on July 30, 1913, whereby \$600,000 was appropriated and the mayor was authorized to select an appraiser for the purpose of arriving at the purchase price.

When the negotiations were taken up with the company after several tentative drafts of an agreement were made, the representatives of the company insisted on inserting in the contract two clauses which were considered objectionable by the corporation counsel. The first clause that was objectionable was as follows:

"The appraisal is to be made upon the plant as a going concern, taking into consideration the reasonable development

expenses incurred by said company in bringing the said corporation, the garbage reduction plant to its present condition."

The second objectionable clause was with relation to the lands upon which the plant was located, on which the appraisers should "take into consideration the peculiar adaptability of same for the purposes for which it is now being used."

On these points it was impossible to agree with the company for the reason that there had been no express authority given to incorporate anything in the contract except what was included in the offer of the company under date of July 10th. Since the representatives of the company did not recede from their position, however, the city council on August 29, 1913, authorized the execution of the contract which contained the objectionable clauses.

After the meeting authorizing the city's representatives to proceed, a contract was entered into and three appraisers were named in accordance with the terms of same. The result of the work of the appraisers was laid before the city council in the form of a report from Col. Allen and an additional report by the other two appraisers in which a compromise offer was made.

The gist of these reports was that Harold Almert, the appraiser for the company, named the sum of \$750,000, while Col. Allen, the appraiser for the city, fixed the sum of \$208,582 as a proper sum to be paid; the third appraiser, Leonard Metcalf, gave as his estimate the sum of \$475,000 and made a further allowance of \$17,500 for services for operating the plant for the month of September, or \$492,500 as the price that he considered proper.

Mr. Almert submitted a communication in which he stated that on behalf of the company he was willing to bind the company by an agreement of \$500,000, or any amount above that which would be acceptable to the other members of the Board of Appraisers but inasmuch as there was no agreement reached Mr. Almert finally consented to the value of \$492,500 fixed by Mr. Metcalf.

This offer was rejected by the city council on October 1, 1913. It was followed by a communication from the Chicago

Reduction Company on October 6, 1913, in which it offered to sell the plant for the sum of \$383,000. This communication was received by the city council and placed on file.

On the 17th of October an ordinance was passed by the city council, directing the comptroller to negotiate for the purchase of the plant, and in case of his inability to agree on a purchase price, further directing that condemnation proceedings should be brought.

Negotiations after that were carried on by the comptroller, but they did not lead to a satisfactory conclusion and thereupon condemnation proceedings were begun with the result that the company finally offered to sell the plant for \$275,000, and that offer was accepted and the plant was purchased.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

MAY 15, 1914.

HON. M. C. BUCKLEY, Local Transportation Expert.

Dear Sir:

On May 11, A. D. 1914, you requested an opinion of this office relative to the right of the Chicago Surface Lines to stop its eastbound cars on Adams street on the farther side of Canal street for the purpose of taking on and leaving off passengers.

Much congestion exists at this point and your department is very anxious to compel the company to comply with the ordinances requiring street railways to stop their cars, for the purpose of receiving and discharging passengers, at the west side of Canal street.

W. M. Weatherwax, Superintendent of Transportation of the Chicago Surface Lines, is of the opinion that if the company is forced to discontinue its present practice of stopping its cars on the east side of Canal street the ordinances governing stops at depots and before entering bridges will be violated.

Mr. Weatherwax has in mind Section 2169 of the Chicago Code of 1911, which provides as follows:

“2169. TO STOP AT BRIDGES, GRADE CROSSINGS, ETC.)

Every conductor, motorman or other person having charge of any street car in operation upon any street railroad in this city shall, when such car is approaching a grade crossing of any steam railroad, or when approaching a swing draw or bascule bridge in use as such, bring such street car to a full stop at a point one hundred feet from such crossing or bridge, and shall then cause such street car to approach such crossing or bridge at a rate of speed not exceeding two miles per hour; provided, however, that if at any such point one hundred feet from such crossing or bridge, the tracks of any such street railroad are laid at an incline which departs more than five per cent. from the horizontal plane, the point at which such full stop shall be made shall be at the point more than one hundred feet from such crossing or bridge, where such incline begins. Every such person having charge of any such street car shall also, when approaching any cross street occupied by street railway tracks which intersect with those on which such street car is being operated, bring such car to a full stop before arriving at and within ten feet of the nearest intersection line of such cross street."

The above ordinance requires street cars to cross at a point 100 feet from a bridge. Our information is that the point where the cars are now being stopped is at a distance much greater than 100 feet, and also that the tracks at a point 100 feet from the bridge are not laid at an incline which departs more than 5 per cent. from the horizontal plane. Assuming that our information is correct, the company has no right to stop its cars at the point where they are now being stopped for the purpose of receiving and discharging passengers. The ordinance on this subject is very plain. Section 2164 of the Chicago Code of 1911, as amended on July 15, 1912 (Council Journal, page 1374) provides, in part, as follows:

"It shall be unlawful for any motorman, driver, conductor or other person having charge or control of any street car in operation upon any street railway in the City of Chicago, in stopping a street car at an intersecting street for the purpose of receiving or discharging passengers, to stop or cause such car to be stopped at any other than the nearest crossing in the direction such car is going."

There is no ordinance requiring street railways to stop

at depots for the purpose of receiving and discharging passengers, and the Chicago Surface Lines are violating the ordinances of the City of Chicago in stopping their cars at the east side of Canal street instead of at the west side of Canal street as provided for in Section 2164 aforesaid.

We are returning herewith copy of the letter signed by Mr. W. M. Weatherwax, dated February 7, 1914, also copy of the letter written by you to W. M. Weatherwax, dated March 24, 1914.

Yours truly,

MAX M. KERSHAK,

Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,

Acting Corporation Counsel.

MAY 16, 1914.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

We have your letter of the 13th inst., with draft of proposed ordinance thereto attached, asking for an opinion in regard to the matter stated in the title at head hereof.

This matter has been frequently before this department on previous occasions. There is a frequently recurring tendency on the part of some of the members of the city council to ask for ordinances of the character of the ordinance here submitted. This tendency, no doubt, has its origin in an honest conviction that the enactment of such ordinances would be just and expedient. With that phase of the question, however, it is no part of our duty to deal.

In the volume of opinions of the corporation counsel from April, 1897, to April, 1905, compiled by Hon. Edgar B. Tolman, we find several opinions dealing with this question. On page 281 of this volume there will be found an opinion written by Mr. Tolman, when attorney for the board of local improvements, and approved by the then Corporation Counsel, Hon. Charles M. Walker. This opinion answers a question propounded by the board of local improvements as to whether

or not the alien and eight-hour clauses should be eliminated from their form of specifications.

Mr. Tolman begins his opinion by citing certain cases in which the Supreme Court of this State has held that provisions in ordinances or in contracts requiring the employment of union labor exclusively in work done for a municipal or public corporation, are void.

Adams v. Brennan, 177 Ill. 194.

Holden v. City of Alton, 179 Ill. 318.

Fisk v. The People, 188 Ill. 206.

The last of the three cases just cited deals also with the eight-hour day provision. In this case the court says in its opinion:

“That part of this clause in the specifications, which makes the contractor liable for a forfeiture of his contract if he allows laborers or employes to work more than eight hours in one day, is unquestionably void and unconstitutional. It infringes upon the freedom of contract, to which every citizen is entitled under the law.”

Mr. Tolman concludes his opinion in this way:

“I am, therefore, of the opinion that the alien and eight-hour clauses should both be eliminated from your form of specifications.”

At page 521 of the same volume is an opinion written by John W. Beckwith, when assistant corporation counsel, and approved by the then Corporation Counsel, Hon. Edgar B. Tolman, in October, 1903. This opinion deals with the eight-hour provision. Mr. Beckwith cites a number of cases in which was considered the constitutionality of laws limiting the hours for which employes might be asked to work. He says in conclusion:

“I am, therefore, of the opinion that this specification attached to and made a part of the contract for public work awarded by competitive bidding, is illegal and void, and that the city cannot force contractors to adopt an eight-hour day under such contract.”

On page 1069 of the same volume is an opinion written in December, 1904, by Hon. Edgar B. Tolman, then corporation counsel, in which he deals with an inquiry propounded by the commissioner of public works as to the validity of con-

tracts for public works containing specifications that, in the doing of the work therein provided for, eight hours shall constitute a day's work. Mr. Tolman reaches the same conclusion as is reached in the previous opinions above referred to, but makes this qualification:

"In every opinion which I have written on this subject, I have carefully confined my conclusion to contracts awarded by competitive bidding, and have repeatedly said that where the city does the work itself by day labor it may establish an eight-hour day."

Since these opinions were written the Supreme Court of the United States has upheld statutes of the States of Oregon and Massachusetts, limiting the time for which women may be employed to ten hours a day; and has also upheld a federal statute limiting the hours of male employes of railroads engaged in interstate commerce.

Muller v. Oregon, 208 U. S. 412.

Riley v. Massachusetts, 232 U. S. 671.

Baltimore, Etc., Rd. Co. v. Interstate Commerce Commission, 221 U. S. 612.

Also, since the opinions above referred to were written, the Supreme Court of Illinois has sustained statutes limiting the hours of employment of women in certain classes of employment to ten hours a day.

Ritchie v. Wayman, 244 Ill. 509.

People v. Elderling, 254 Ill. 579.

The Supreme Court of Illinois does not in these cases admit that it is overruling anything which it has previously decided in regard to this question. But, certainly, some of the *dicta* in the previous cases, affirming the absolute right of every adult person to contract regarding his or her labor as he or she may see fit, must be regarded as modified by these decisions.

Since the opinions above referred to were written, the Supreme Court of Illinois has also decided in December, 1905, that the provisions of Sections 10, 11 and 12 of the State statute known as the Aliens Act, prohibiting under penalty, the employment of alien laborers if they are to be paid from funds raised by taxation, are unconstitutional and void.

City of Chicago v. Hulbert, 205 Ill. 346 (opinion, p. 363-364).

In this case the court says:

"A similar law was enacted by ordinance in the City of Chicago, and we have repeatedly held that such law is invalid, as it is in contravention of the constitution and the right of individuals to contract. The statute in question is void upon the same grounds, and neither the city nor the contractor was under any obligation to observe it."

We do not find anything in the decisions just referred to, rendered since the opinions of the corporation counsel were written, which gives good ground for modifying the conclusions reached in these opinions.

We, therefore, advise you that it is not within the power of the council to enact the ordinance which you submit for our opinion, or any similar ordinance. We do not think that anything would be gained by our endeavoring to draft an ordinance "along the lines of the one submitted" in the hope of any such ordinance being held valid.

In conclusion we would call your attention to the fact that it is provided by Section 2134 of the Code of 1911, that,

"Eight hours shall constitute a legal day's work upon all work performed under any contract entered into with the City of Chicago,"

and by Section 2135 that,

"Eight hours of labor between eight o'clock A. M. and five o'clock P. M. shall be and constitute a legal day's work for all employes performing manual labor for the city."

There is not here any express prohibition of employing any one for more than eight hours. Having regard to the wording of these sections and the wording of Section 1697, providing a general penalty in cases where no special penalty is provided for by an ordinance, we do not think it could be successfully contended that the penalty provided by Section 1697 could be imposed in cases where the length of eight hours' time was exceeded, even assuming the ordinance, as so construed, to be constitutional. These provisions, would, therefore, seem to amount to nothing more than a re-enactment by way of ordinance of the provisions of the State statute. It is provided by the State statute that, in the absence of contract to the contrary, eight hours of labor, between the rising and

setting of the sun, in all mechanical trades, arts and employments and other classes of labor and service by the day, except in farm employments, shall constitute and be a legal day's work.

In view of what is said by the Supreme Court in the case above cited or referred to, it would seem that this provision of the statute goes as far as it is possible to go in this matter.

Yours very truly,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

MAY 18, 1914.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

Your request for an opinion as to the legality of contract obligations relating to the proposed Lake Street bridge was referred to the undersigned for consideration and reply.

The proposed bridge is to be paid for out of the proceeds of bridge bonds which were authorized by the vote of the people. The City Council, in providing for the work of construction, made an appropriation under code designation 401-X7 authorizing the building of the bridge at a total estimated cost of \$580,000, of which a part was to be paid by the Chicago & Oak Park Elevated Railroad Company, but set apart only \$250,000 as the amount to be expended on same in the year 1914.

The question therefore arises whether it is proper at this time to enter into contract obligations to an amount exceeding the sum thus fixed to be expended during the current year.

Similar questions have often arisen where the expenditures were to be made from the general corporate fund and a fixed sum was appropriated, and in such cases, although we had no judicial interpretation of the statute to guide us, this department has uniformly held that the city could not contract for more than was authorized to be expended by the appropriation bill, and that if a contract for an improvement

involving a greater amount was entered into by a subsequent order of the City Council, the contract should be so worded that the city does not incur any further liability than the amount actually appropriated if no additional appropriations are made in subsequent years. We also held this to be the law when the expenditure was authorized to be paid out of a bond issue which was appropriated in full where a contract for a larger amount was proposed. On the other hand, we have held, under the authorities cited below, that where no present liability is created, as in the case of contracts for light or water extending over a term of years or for rent of premises for a term of years, that a contract may be entered into in advance of an appropriation, on the theory that no liability accrues except as the service is rendered from month to month.

Cain v. City of Wyoming, 104 Ill. App. 538.

East St. Louis v. Flanigan, 26 Ill. App. 449.

Town of Kankakee v. McGrew, 178 Ill. App. 74.

The situation in the present instance, however, is different. The City Council very plainly had in view the fact that the money for the improvement was provided for by bonds and that a larger contract than the amount fixed for expenditure during the current year would necessarily be entered into. Under such circumstances we are of the opinion that contracts exceeding the amount to be expended during the current year and not exceeding the total estimated cost can be lawfully entered into at the present time.

The statute prohibiting expenditures beyond the amount appropriated in the annual appropriation bill reads as follows:

“§ 3. Neither the city council nor the board of trustees, nor any department or officer of the corporation, shall add to the corporation expenditures in any one year anything over and above the amount provided for in the annual appropriation bill of that year, except as is herein otherwise specially provided; and no expenditure for an improvement to be paid for out of the general fund of the corporation shall exceed, in any one year, the amount provided for such improvement in the annual appropriation bill. * * *”

You will observe that the above contains two distinct

provisions. The first absolutely prohibits (with certain exceptions) the expenditure of more money than is appropriated for in the appropriation bill for the current year. The second provision limits the expenditure for an improvement to be paid for out of the general fund, in any one year, to the amount appropriated.

The words "general fund" in the statute, seem to indicate that the limitation does not apply to improvements to be paid for out of bond issues, although we would still hold that under the ordinance no greater expenditure than the amount to be expended for the current year is authorized. Therefore this point is of no consequence. But the wording clearly indicates that an improvement may be constructed which will not be completed in a year, and it must follow that there is some lawful method of contracting for such an improvement.

Turning to the next section of the statute, we find that there is a limitation placed on contracts which may be entered into. Said section reads as follows:

"§ 4. No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided."

The section last quoted has from time to time received the most earnest and thoughtful consideration of various members of the city's law department. But no one has undertaken to say with certainty just what is meant. Taking the words used literally, and having regard for the punctuation, especially the semi-colon which appears in same, the first clause means that no contract can be made by the City Council or any committee or member of same, and the second clause means that no "expense" as distinguished from a "contract" can be incurred by an officer unless some kind of an appropriation concerning it, whether for the whole of the expense or a portion of it, has been previously made. But such literal interpre-

tation, viewed from the standpoint of other statutes and other sections of the same statute, is absurd.

The City Council undoubtedly has the right to make and to authorize officers of the city to make contracts, and the section must be so construed. The only question therefore is, what limitation has been placed on that power by this section. As stated above, we have no court decisions to guide us, and we can not even obtain light on the subject from former charters. We can only construe the section with reference to other sections, and to do that it is necessary to ignore the punctuation and to use the words "contract" and "expense" as synonymous terms.

Having in mind such an interpretation of the language used and the decisions of our courts to the effect that a contract for more than a year may be entered into where no present expense above what has been appropriated is incurred, we believe that a fair construction of the two sections quoted will permit contracts to be made which extend beyond the fiscal year in cases where the City Council has expressly authorized them and the same are to be paid for from proceeds of bonds if the expenditure for the current year does not exceed the amount fixed in the appropriation bill. We also believe that it is proper to make a contract when authorized to do so by the City Council for an improvement that cannot be completed during the current year in case there is inserted into the contract a provision to the effect that the city will not be bound by same, in any subsequent year unless an appropriation is made. And finally, we believe a contract extending beyond the year where no obligation arises except what is earned from month to month or from time to time, as in the case of a lease, when duly authorized by the City Council and the first year's appropriation has been made, is also lawful.

In the present instance there is express authority given to enter into contracts for the bridge to the extent of \$580,000, to be paid for out of proceeds of bonds, and such contracts may be lawfully entered into. No greater amount than \$250,-

000 can be paid on same, however, until further appropriation is made.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

J. W. BECKWITH,
Acting Corporation Counsel.

MAY 19, 1914.

HON. EUGENE BLOCK, Chairman, Committee on Local Transportation.

Dear Sir:

You transmitted to us copy of the report of the street railway accident at Van Buren street and Racine avenue made to the city council by the transportation expert. Said report has been referred to your committee and contains certain recommendations, and your committee desires to be informed whether it is within the power of the city to require the street railway companies to carry out the recommendations contained in said report.

It appears from the report of Mr. Buckley that eighteen passengers were hurt, and some seriously, by reason of a collision between a Van Buren street and Racine avenue car due to slippery rails and the inexperience of the motorman operating the Van Buren street car. Mr. Buckley also thinks that the schedules should be made longer in bad weather so that the cars may run "safe." The word "safe" means that the "cars should be run slowly regardless of schedules so that the lives of the people may be protected."

Mr. Buckley makes the following recommendations:

1. The student motorman should be kept thirty days before they are sent out with street cars and they should be paid two dollars a day during their studentship.

(At present the period of studentship is only fifteen days and they are not paid during this period.) If motormen are employed for a period of thirty days this will give them a longer period in which to familiarize themselves with the operation of the cars and will also make them more familiar with

the different routes that they as students will be called upon to operate upon.

2. The running schedule in bad weather should be lengthened so as to give the men operating the cars from five to ten minutes at the end of the outer terminals.

Section 10 of the ordinances to the Chicago Railways Company and Chicago City Railway Company, dated February 11, 1907, provides as follows:

"Section 10. The Company hereby agrees to comply with all reasonable regulations of the service of the said street railway system which may be prescribed from time to time by the City Council of said City and that the approval of any such regulation by the Board of Supervising Engineers shall be binding upon the Company (but not upon the City) as to the reasonableness thereof."

Section 35 of the ordinance to the Chicago City Railway Company, dated February 11, 1907, and Section 37 of the ordinance to the Chicago Railways Company, dated February 11, 1907, provide as follows:

"Nothing in this ordinance contained shall be construed as depriving the said City of the right of exercising any police power which it would have possessed or enjoyed had this ordinance not been granted.

"The enumeration herein of special requirements and specific regulations shall not be taken or held to imply the relinquishment by the said City of its power to make other requirements or regulations, and the said City hereby expressly reserves the right to make all regulations which may be necessary to secure in the most ample manner the safety, welfare and accommodation of the public, including among other things the right to pass and enforce ordinances to protect the public from danger or inconvenience in the management and operation of street railways throughout the said City and the right to make and enforce all such regulations as shall be reasonably necessary to secure adequate and sufficient street railway accommodations for the people, and insure their comfort and convenience."

These provisions remain unaffected by the Unification ordinance passed by the city council on November 13, 1913. (Council Journal, page 2620.)

We do not believe that the city has the power, under the above ordinances, to regulate the pay of the employees of the

companies. These are matters which relate to the internal management of the company and cannot be interfered with by the city.

Requiring the companies to intrust the operation of cars only to such men who have served as students for a sufficient length of time to make them competent in the operation of such cars, and requiring the companies to lengthen the running schedules during inclement weather presents a different question. In such matters there can be no doubt that the city has the power to pass all reasonable rules and regulations which may be necessary to secure in the most ample manner the safety, welfare and accommodation of the public, provided that such regulations are reasonable.

We are of the opinion that the city has the power, under the 1907 ordinances, to pass reasonable regulations to the end that competent motormen may be intrusted with the operation of street cars, and also with respect to the running schedules in the interest of the welfare and safety of passengers and others who have occasion to use the streets upon which tracks are laid.

Yours truly,

MAX KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 21, 1914.

HON. M. J. DEMPSEY, Chairman, Sub-Committee of Committee on Judiciary, Etc.

Dear Sir:

You referred to the undersigned a resolution passed by the city council some time ago directing the committee on judiciary to take up the question of limiting the size and capacity of motor trucks, and you requested a written opinion covering the view expressed by the writer.

According to the terms of the resolution, the intention of the council was to limit the length, width and height, and also, perhaps, the carrying capacity of motor trucks, some of

which are declared in the preamble to be in size and capacity like a modern railroad box car.

As explained to you, this matter was under consideration by the law department last year, and an ordinance would have been drafted along the lines indicated if it had not been for certain obstacles which were mentioned at the time, and which are still considered before the council takes final action in regard to this matter.

The city council is given very broad powers with reference to the use, control and maintenance of streets and the regulation of traffic thereon. There are numerous clauses in the section of the Cities and Villages Act conferring powers on the city council in relation to same. Under these powers there is no doubt that prior to 1907 the subject-matter was entirely within the control of the municipality. In that year, however, an amendment to the said section was passed which added, among other things, a clause intended to authorize a vehicle tax. Said clause reads as follows:

“Ninety-sixth—To direct, license and control all wagons and other vehicles conveying loads within the city, or any particular class of such wagons, and other vehicles, and prescribe the width and tire of the same, the license fee when collected to be kept as a separate fund and used only for paying the cost and expense of street or alley, improvement or repair.”

You will observe that the legislature gave the city council power to “prescribe the width and tire” of vehicles by the addition of the above clause. When the purpose of this legislation is borne in mind, it is obvious that the word “and” was intended to be “of,” since the entire clause is directed to the object of keeping the street in repair and the width of the tire on vehicles is a most important element to be considered. But the mistake, if it was a mistake, will have an important bearing on the proposed ordinance, for one of the rules of construction which applies to all powers granted to a municipality is that, where an express power is given, such power cannot be enlarged or amplified by invoking the general police powers of the municipality. In other words, if this clause is to be understood as authorizing the city to prescribe the “width”

of a vehicle, it cannot be interpreted as including power to prescribe the "length" or "height" of same.

The above point will unquestionably be raised in case the city council undertakes to prescribe the size of motor trucks in any other respect than as to width. It will then have to be determined whether the clause in question must be interpreted as written or as plainly intended.

Much can be said on both sides of this question, and we will not undertake to argue same, except to say that same section was re-enacted in 1911 with the same wording, and it is quite likely that the courts will say that while the legislature may have made a mistake the first time, it cannot be assumed that they have made a mistake when they re-enacted the same clause four years after it first became a law. You will, therefore, see that it is at least doubtful whether it is expedient at the present time to undertake to limit the height or length of vehicles, and we would not recommend such action unless it is absolutely necessary. It is quite likely that a limitation placed on the width of vehicles will accomplish the end in view. An ordinance limiting the width can be easily sustained in the courts if it is reasonable, and it is probable that if the width is limited it would naturally carry with it a limitation on the length and height, since the builders of same would not be able to construct them so as to make them practicable if the height and length is out of proportion to the width.

So far as the weight of vehicles is concerned, you will note, by reference to the ordinances, that there is at present no limitation on the carrying capacity. We have ordinances which limit weights to be drawn by horses, and we have ordinances prescribing the width of tires and keeping the weights within certain limits until the maximum width of tire is reached, but above that there are no further limitations. This is undoubtedly due to the fact that it becomes necessary, frequently, to transport articles of extraordinary weight through the streets, such as structural iron for buildings and bridges, and some other things that could be mentioned. The result is, that any limitation that might be placed on the weight which is permitted would result in being prohibitory so far

as such heavy materials are concerned, and it would be difficult to arrive at any limitation which would be reasonable and effective.

We call attention to these matters in order that your committee may be fully advised as to the propriety of enacting any ordinance which does more than limit the width of vehicles.

We also beg to call your attention to the fact that such an ordinance could not apply to motor trucks alone, but would have to be made general and include all vehicles, otherwise it would be held discriminatory.

If, after considering all these points, it is your desire to have us draft an ordinance along the lines indicated, we will endeavor to frame one that will be effective and at the same time will stand the test of validity.

We herewith return the resolution of the city council which you submitted to us.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. SEXTON,
Corporation Counsel.

MAY 25, 1914.

TO THE HONORABLE THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

On May 11, 1914 (C. J. P. 185) an order introduced by Alderman Carr "directing the corporation counsel to render an opinion in reference to the requirements necessary to obtain legislation providing for the imprisonment of all persons convicted of carrying concealed weapons without authority, and also as to whether the city has power to determine the manner in which deadly weapons may be sold" was referred to the committee on judiciary. On the same date (C. J. P. 205) an order introduced by Alderman Fisher directing the corporation counsel to render an opinion as "to what extent the City of Chicago has the power without additional state

legislation, to regulate and limit the sale of firearms in this city" was passed. On May 18, 1914 (C. J. P. 349) an order introduced by Alderman Nance directing the corporation counsel to render an opinion as to the validity of an ordinance regulating the sale of firearms and other dangerous weapons passed May 11, 1914 (C. H., pp. 186-187) and directing the corporation counsel to transmit with said opinion such amendments as might be found necessary to render said ordinance valid, was passed.

An opinion to the committee on judiciary in answer to the request contained in the first of the aforementioned orders has been prepared and transmitted to said committee.

Before specifically answering the questions raised in the last two orders above referred to, we deem it advisable to call your attention to the ordinances passed by the city council in recent years relative to the same subject matter and to the experience under and the practicability of said ordinances. The rights of the city in reference to the regulation of the use and sale of deadly weapons has frequently been the subject of opinions by the law department in passing on the numerous ordinances which have been proposed and enacted from time to time.

On March 23, 1908 (C. J., pp. 4632-4636), two ordinances were passed by the city council, the first of which required the procurement of a license to purchase deadly weapons and the second of which required the procurement of a license, the keeping of a register, and the transmission to the chief of police of a record of sales by dealers in deadly weapons. The second ordinance was returned to the city council by the mayor on March 30, 1908 (C. J., pp. 4683-4686) with an amendment to Section 3 thereof relating to the filing of a bond by licensed dealers, which ordinance, with the amendment, was at that time passed. These two ordinances contained all the provisions contained in the ordinance passed by the city council on May 11, 1914, except that provision prohibiting the *display* of deadly weapons.

The amended ordinance of March 30, 1908, was subsequently repealed by an ordinance passed June 14, 1909 (C. J., pp. 675-679) which ordinance contained certain provisions

relative to the sale of deadly weapons to travelers as therein defined which were not contained in the former ordinance. On January 7, 1911, Hon. Edward J. Brundage, Corporation Counsel, after a conference with the representatives of the dealers in firearms and Chief of Police Shippy, in a communication addressed to his successor, Chief Steward, stated that "there is no doubt but that the city's attempt to restrict the sale of firearms by ordinance has proven abortive." On January 30, 1911 (C. J., p. 3561), all of the aforementioned ordinances were expressly repealed as a result, no doubt, of the recommendation of the chief of police.

On July 6, 1911 (C. J., pp. 688-689) another ordinance requiring the licensing of, the keeping of a register by, and the transmission to the general superintendent of police of a record of sales of dealers in deadly weapons and further making it unlawful for any person to purchase any such weapon without securing a permit from the general superintendent of police so to do was recommended for passage by the committee on judiciary. This ordinance was recommitted to the committee on October 2, 1911 (C. J., p. 1282), was recommended for passage with slight changes therein, on December 11, 1911 (C. J., pp. 1957-1959), and was passed on December 18, 1911 (C. J., pp. 2078-2079). On December 28, 1911 (C. J., p. 2097), the vote on which said ordinance had been passed was reconsidered and the ordinance again recommitted to the committee on judiciary. On January 15, 1912 (C. J., pp. 2460-2461) said ordinance was again recommended for passage and on March 4, 1912 (C. J., pp. 3052-3053), said ordinance was again passed by the city council. This ordinance contains substantially the identical provisions of the ordinance passed May 11, 1914, except that it did not contain the provision relating to the *display* of weapons and the amount of the penalty provided for therein was different. Section 5 of said ordinance was amended May 20, 1912 (C. J., p. 379).

On July 1, 1912 (C. J., pp. 1010, 1011), a new ordinance was passed by the city council eliminating the requirements for the procurement of permits for the purchase of weapons, but providing that dealers in weapons must procure an appli-

cation filled out by purchasers and forward the same to the superintendent of police. This ordinance in no way referred to the former ordinance which had not been repealed. The section of this ordinance relating to the payment of license fees was amended on September 30, 1912 (C. J., p. 1842).

On February 14, 1913, the mayor, in a communication to your honorable body with reference to the subject of deadly weapons said, "Our present laws relating to the same subject-matter are wholly inadequate because of the light punishment by fine now provided for the carrying of concealed deadly weapons." With this communication a draft of a bill prepared by the corporation counsel, at the mayor's direction providing for the punishment of persons unlawfully carrying or dealing in deadly weapons, was attached and appears in the Council Journal of that date at pages 3708 and 3709. This bill was introduced in the State legislature and the hearings on the same by the committee to which it was referred were attended by representatives of this office who vigorously urged its passage.

We have referred to the above ordinances on this subject-matter before answering the questions presented by your orders so that you may be advised of the same and the dates of their passage.

We shall now take up the questions presented, first dealing with the power of the city council to legislate on the subject-matter, and, secondly, dealing with the ordinance passed by the city council on May 11, 1914.

The first question requires a consideration of the power of the State to regulate the use of firearms and weapons by an individual and the extent of the power delegated by the State to the city council.

The second amendment to the Constitution of the United States declares as follows:

"A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

This amendment has been held by the Supreme Court of the United States to be a limitation only upon the powers of

Congress and the National Government, and not upon that of the States.

Presser v. Illinois, 116 U. S. 252, 265.

United States v. Kruikshank, 92 U. S. 542, 553.

Similar constitutional provisions are contained in the constitutions of a majority of the States of the Union, but such a provision is not found in the constitution of this State, wherefore the exercise of the police power on this subject by the State legislature is only limited to the extent that the legislation shall bear a relation to the health, safety, good order or welfare of the people.

The total suppression of the use and sale of firearms within the State is therefore within the power of the State legislature, provided such legislation is so enacted as not to interfere with interstate commerce.

In *Strickland v. State* (Ga.), 36 L. R. A., n. s., 115, a statute prohibiting any person in any one county in the State of Georgia from having or carrying about his person any pistol or revolver without first having obtained a license so to do was held valid.

In *Salina v. Blaksley*, (Kan.) 3 L. R. A., n. s., 168, a statute, providing that city councils might prohibit the carrying of firearms or other deadly weapons, concealed or otherwise, was held valid.

The original charter of the City of Chicago, as amended February 13, 1863, Chapter 14, Section 2, paragraph 4, provides that the common council shall have power to "regulate and prevent the use of fireworks and firearms," which provision is still in force. Whether this power includes power to prohibit the sale of firearms is a question not free from doubt, but it appears to us that the sale of firearms is incidental to the use of same, and that the city council may make such restrictions and regulations relative to the sale of firearms, such as the requiring of a license the filing of a bond, and the submission of reports, as it sees fit; provided such regulations are not discriminatory and do not interfere with interstate commerce. Even in the absence of an express power on this subject, we are of the opinion that the city council has power to regulate the sale of firearms under its

general police power, and, as an incident thereto, has power to require a license of those engaged in the sale of same.

In *ex parte Cheney*, 90 Cal. 617, an ordinance, making it unlawful for anyone, other than police officers and travelers, to wear or carry a concealed or dangerous weapon without securing a permit so to do from the police commissioners, was sustained.

The express power, heretofore referred to, unquestionably authorizes the city council to pass an ordinance absolutely prohibiting the use of firearms within the city, unless this power has been taken away or abridged by subsequent State legislation.

An Act of the legislature relating to the traffic in deadly weapons was approved April 16, 1881 and became in force July 1, 1881, (Hurd's R. S. of 1913, p. 813), Chapter 38, paragraph 54—a, b, c, d, e, f and g). Section 1 of this act absolutely prohibits the sale, purchase or possession of slungshots and metallic knuckles; section 2 prohibits the sale or gift of pistols, revolvers, derringers, bowie knives, dirks or other deadly weapons of like character to minors by anyone not being the father, guardian or employer of such minors; section 3 requires a register to be kept by persons dealing in deadly weapons; section 4 prohibits the carrying of concealed weapons; section 5 relates to the disposition of fines; section 6 excludes certain officers from the provisions of section 4; section 7 repeals all acts in conflict with the above provisions.

The aforementioned act must be considered in drafting an ordinance regulating the use or sale of deadly weapons and the provisions of such ordinance must not so conflict with those of the act referred to as to be repugnant thereto.

Numerous Illinois cases sustain the proposition that the police regulations of the city may differ from those of the state upon the same subject matter if they are in harmony with same.

City of Clinton v. Wilson, 257 Ill. 580, 586;

City of Chicago v. Drogasawacz, 256 Ill. 34, 37;

City of Chicago v. Union Ice Cream Co., 252 Ill. 311.

Considering the aforementioned act as legislation applicable to all parts of the State, we are of the opinion that this

act does not limit the City of Chicago in the exercise of the express power conferred upon it to regulate and prevent the use of firearms.

We are therefore of the opinion that without additional State legislation the City of Chicago may absolutely prohibit the use of firearms, may license the sale of same, and may enact non-discriminatory provisions requiring permits to be secured for the purchase or possession of same.

The validity of the ordinance passed May 11, 1914, is controlled by the conclusions just set forth. Certain amendments to the same, however, are advisable.

The prohibition of the sale or purchase of deadly weapons contained in section 1 thereof should be incorporated in a separate section and should exclude sales made for delivery outside of the State to avoid possible attack on the ground that this provision is an interference with interstate commerce.

The provision of section 5 requiring applications for leave to purchase firearms to be signed by two taxpayers is likely to be construed to be discriminatory and the provision we have incorporated in lieu thereof permits the accomplishment of the purpose in view and eliminates the objection just mentioned.

This ordinance in no way refers to the ordinances passed by the city council on March 4, 1912 and on July 1, 1912 as amended September 30, 1912, which ordinances relate to the same subject matter and should be expressly repealed to avoid any question as to conflicting provisions on this subject.

We transmit herewith draft of an ordinance amending said ordinance of May 11, 1914, in accordance with the suggestions herein made and are of the opinion that if such ordinance is thus amended, it can be sustained as a valid exercise of the city's power.

Respectfully submitted,
 LORING R. HOOVER,
 LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
 WM. H. SEXTON,
Corporation Counsel.

MAY 25, 1914.

HON. EUGENE BLOCK, Chairman of Committee on Local
Transportation:

Dear Sir:

On May 14, 1914, you requested this department to prepare for the committee on local transportation an ordinance granting rights to the Chicago City Railway Company to extend its system over West 22nd street from Crawford avenue to Kenton avenue. (Crawford avenue was formerly called 40th avenue, and Kenton avenue was formerly called 46th avenue.)

On May 21, 1914, you supplemented this letter by requesting this department to furnish your committee with an opinion as to whether the Chicago, Riverside & La Grange Railroad Company now have valid rights in 22nd street from 40th avenue to 46th avenue.

In this letter we purpose to discuss the rights of the Chicago, Riverside & La Grange Company in 22nd street. By reason of the conclusion reached herein, we have not prepared the ordinance requested in your letter of May 14, 1914. If, however, you still desire that we prepare this ordinance along the lines suggested in your letter of that date, please let us know and we will immediately prepare such ordinance.

On March 16, 1903, (Council Journal 2723), the City Council passed an ordinance granting, to the Chicago, Riverside & La Grange Railroad, track rights for a period of 20 years in that part of 22nd street:

“from the center line of South 40th avenue to the center line of South 46th avenue, and to connect at South 46th avenue with the tracks of the Suburban Railroad Company.”

Section two provides that the tracks of said company shall not be elevated above the surface of the street and shall be laid in such a manner that carriages and other vehicles can easily cross the same.

The same section also contains a provision that the company shall pave its roadway from outer rail to outer rail with macadam.

With respect to the last named obligation, it is the

duty of the company to keep its right-of-way in proper repair even independent of ordinance requirements.

Nellis on Street Railways, section 161.

Booth on Street Railways, section 243.

On January 9, 1911, (Council Journal 3402) the Chicago Riverside & La Grange Railroad Company entered into an operating agreement with the Southern Street Railway Company, approved by the city council of the City of Chicago, whereby the Riverside company leased to the Southern company the "joint use of the tracks and their appurtenances in and upon 22nd street from the westerly line of South 40th avenue to South 46th avenue" upon certain terms and conditions.

All the lines of the Southern Street Railroad Company are being operated by the Chicago City Railway Company under an operating agreement approved by the city council on March 15, 1909. (Council Journal, 3285.)

Alderman Toman informs us that the tracks in 22nd street from 40th to 46th avenue are elevated above the surface of the street, and that said tracks are so laid as to make it difficult and dangerous for vehicles to cross. The old style "T" rail is used and the right-of-way resembles the right-of-way of a steam railroad. In addition, the company is not complying with its ordinance obligations relating to the keeping of its right-of-way in a proper condition of repair.

Assuming that our information is correct, the Chicago, Riverside & La Grange Railroad is in default with respect to its ordinance of March 16, 1903.

There is no provision in said ordinance of March 16, 1903, which gives the city the right to forfeit the grant upon breach of any of the conditions named in said ordinance. In grants giving a city the right to dissolve a contract upon failure to comply with conditions subsequent, a city, upon nonfulfillment of specified conditions may terminate a grant at its election without a judicial determination of the breach. But where a term of an agreement is broken and there is no agreement that the breach thereof shall operate as a termination of the contract, a city has no right to declare a forfeiture without a judicial determination of the breach.

Belleville v. Citizens Horse Ry Co., 152 Ill. 187.

The rule of law is that when an ordinance granting rights to a street railway company, which contains no provisions for a forfeiture by the city has been accepted by the company, the rights thereby conferred become vested and can only be declared forfeited by a court of competent jurisdiction in a suit brought for that purpose.

Nellis on Street Railways, sec. 72.

In such case an ordinance passed by a city council declaring the rights granted void and forfeited is alone of no force or effect.

Spencer v. City of Palestine, 116 S. W. 857.

City of Alexandria v. Morgan Company, 109 La. 58.

In the latter case the court said:

“The municipal officials were without authority to adjudge that there had been a breach by the railroad company of the conditions of its franchises and contract with the city. Certainly so when the ordinance granting the rights claimed by the company did not stipulate such power or reserve it to the municipality. * * * The City of Alexandria might institute a suit to forfeit for failure of compliance with the conditions of the grant; but could not itself sit in judgment in a case when it is complainant and enter up judgment against the grantee.”

See also Booth on Street Railways, section 49.

Akron, Bedford & Cleveland Railroad Co. v. Village of Bedford, 6 Ohio N. P. 276.

In *Easton Passenger Ry. Co. v. Easton*, 133 Pa. 531, the court uses the following language in a case where the city, under an ordinance containing no right to terminate the grant on noncompliance of conditions, proceeded to tear up tracks without a previous judicial determination:

“They, (city officials) were merely trespassers and rioters and liable civilly and criminally as such * * *. The officers of a municipality from the mayor to the police officers are as much bound by the law as a private citizen, and have no license to transgress the law in the enforcement of the law.”

We have found some cases where the action of the city, in terminating by ordinance a grant containing no reservation giving the city this right, has been sustained. See:

Farmers Loan & Trust Company v. Galesburg, 133 U. S. 156.

These cases are very few, and the violations have been of a grave and important nature. However, the weight of authority is the other way, and especially so where noncompliance has been acquiesced in for a number of years and there is no showing that notice has been served upon the company specifying instances of noncompliance, the courts holding that a municipality has the undoubted right to waive acts of noncompliance.

Wheeling v. Tridelpia, 4 L. R. A., 334 (n. s.) citing *Kneeland v. Gilman*, 24 Wis. 39.

Martel v. East St. Louis, 94 Ill. 67.

Chicago R. I. & P. R. R. Co. v. Joliet, 79 Ill. 39.

In view of the fact that the city has acquiesced for some time in the failure of the company with respect to keeping the tracks at a level with the surface of the street, and with respect to the failure of the company to keep its roadway in proper condition of repair, and in view of the further fact that official notice has never been given to the company (as far as we have been able to ascertain) specifying the instances of noncompliance with the ordinance, it is our opinion that before court proceedings are taken by the city to forfeit the rights of the company under the ordinance of March 16, 1903, that the commissioner of public works serve notice upon the company setting out the instances of noncompliance and giving the company a reasonable time within which to make good its defaults.

Should the company persist in its refusal to comply with the ordinance requirements, then court proceedings may be instituted to forfeit the rights of the company under its ordinance.

Proceedings may also be instituted for indicting the company for maintaining a nuisance, the courts holding that a street railroad may become a nuisance by reason of failure to keep its tracks and roadbed in repair, thereby obstructing travel.

36 Cyc. 1428.

Railway Co. v. State, 87 Tenn. 746.

We desire further to call your attention to the fact that the ordinance of March 16, 1903, to the La Grange company

also provides that the said company should file with the city clerk a bond in the sum of five thousand dollars to secure the faithful performance of the terms and conditions named in said ordinance. This bond is now on file with the city clerk, and is signed by the Chicago, Riverside & La Grange Railroad, as principal, and Charles Fitzsimons, Charles N. Post, J. D. Byrne, G. E. Griswold and F. H. Roeschlaub, as sureties.

While we have not had the necessary time to determine the financial responsibility of either the company or the above-named sureties, at the same time, we believe it is very likely that some of the sureties might be able to respond in damages if the company cannot.

We also call your attention to the provisions of section 2150 of The Chicago Code of 1911, which reads as follows:

“Track not to Obstruct Vehicles—Repair of Streets.

Every person or corporation operating a street railroad in the city shall keep the tracks of his or its road in such a condition that such tracks shall not at any time be elevated above the surface of the streets on which they are laid, and so that vehicles can easily and freely at all times cross such tracks at all points, in any direction, without obstruction; they shall also keep in good repair such portions of the streets as they severally have agreed or may agree with said city to keep in repair.” * * *

Section 2152 provides for notice to the company, and section 2153 provides for prosecution and penalty upon failure to comply.

Should it be the desire of your committee that this department bring proceedings to forfeit the grant of the La Grange company, we will prepare the necessary notices and proceed against the company along the lines suggested in this letter.

Respectfully submitted,

JOHN W. BECKWITH,

MAX M. KORSAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 25, 1914.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

In your letter of recent date you call attention to the fact that the city council, on May 18th authorized the issuance of \$650,000 worth of Sewer Loan Refunding bonds which will mature on July 1, 1914.

You state also that on the same date Water Loan bonds to the extent of \$403,000 will mature; that there is enough money in the water loan sinking fund to pay for the Water Loan bonds maturing, and that there is, besides that, a sufficient sum in the water fund to pay for these Water Loan bonds without drawing on the water loan sinking fund. You then say that a suggestion has been made to the effect that the \$403,000 in the water loan sinking fund might be used to retire an equal amount of Sewage Refunding bonds if it can be legally done.

Two questions, therefore, arise. First, whether it will be legal to use moneys collected from levies for water loan sinking fund to retire Sewage Refunding bonds; and second, whether it would be legal to use surplus moneys in the water fund to retire the Water Loan bonds when tax levies have been made and collected to pay for same.

The first proposition advanced is purely and simply a plan to divert money from the water fund to other purposes. This cannot legally be done. This question was fully considered and disposed of in the case of *People ex rel City of Chicago v. Hummel*, 215 Ill. 71. That was a case in which it was proposed to transfer \$650,000 from the water fund to the general corporate fund, and it was fought out on the theory that the Cities and Villages act superseded all former charter legislation in regard to such matters and authorized the city council to apply the funds derived from water loan bonds, water rents, or other revenues obtained for the waterworks of the city to another purpose. The court, however, held that all prior charter provisions not inconsistent with the Cities and Villages act were still in force, and quoted, in its opinion, sections 13 and 32 of the Charter act of 1863 as provisions relating to the water funds which must be observed. Said section 13 reads as follows:

"Sec. 13. All funds derived from the sale of said water loan bonds, or from water rents, or otherwise, for the water works of the city, shall be exclusively used and appropriated by said board to the objects and purposes pertaining to the water supply of said city herein specified; nor shall the same, or any part thereof, be used by said board or by said city for any other purpose."

Section 32 makes it the duty of the city treasurer to keep such funds separate and distinct from all other moneys and makes him liable for embezzlement in case he pays them out for any other account than those pertaining to the water fund.

While section 13 does not specifically mention funds derived from tax levies for the purpose of retiring Water Loan bonds, it would be straining the construction of this section to say that they were not included in the general language used, since the words "or otherwise" must be held to include moneys raised in any way for the waterworks of the city. Therefore, it is quite plain that the funds so collected from the taxpayers for the purpose of retiring water loan bonds must be used for paying said bonds, and cannot be diverted to any other purpose.

There is no provision in the statute for the use of moneys collected for purposes of a sinking fund to retire bonds in any other way than through the medium of tax anticipation warrants until the bonds for which the moneys were collected are paid off.

Under the rule laid down in the Hummel case, any surplus remaining after the payment of bonds from such tax levies would go into the general water fund, just as surplus remaining from other sinking funds go into the general corporate fund.

The answer to the first question practically disposes of the second question, since the money must necessarily be used to retire the Water Loan bonds, and therefore there will be no occasion for drawing on the general water fund to retire them. The accumulations in the water fund can be used for retiring Water Loan bonds in case no levies have been made, or such funds can be used for future improvements or to reduce the water rates, as may be determined by the city council. But, under the situation presented at the

present time, we see no advantage in shifting any of the funds in question, since the first suggestion cannot be carried out.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 25, 1914.

HON. EUGENE BLOCK, Chairman, Committee on Local
Transportation.

Dear Sir:

On May 14, 1914, you requested this department to advise your committee whether the South Side Elevated Railroad Company can be required to pave either the space underneath its structure or the adjacent alley or both between Forty-third and Sixty-third streets.

On March 16, 1903, the city council passed an ordinance requiring several of the railroad companies to elevate their tracks. This ordinance also permitted the South Side Elevated Railroad Company to construct a third track adjacent to its present tracks between Twelfth and Forty-third streets.

Since there was no room to construct said third track over the right of way of the company said company was permitted to construct said third track over the alleys of the city adjacent to its right of way between Twelfth and Forty-third streets. This ordinance is contained on page 573 of the Track Elevation Ordinance and is also found in the Journal of the Proceedings of the City Council of March 16, 1903, pages 2689-2722.

This ordinance, among other things, contains the following provision:

“* * * In consideration of the above and foregoing grant of privileges to said South Side Elevated Railroad Company, it has agreed * * * that it shall and will pave with asphalt not only said north and south alleys and the courts and public places in the line thereof hereby authorized to be used by it, but also the right of ways of said company adjacent to and parallel therewith.”

The above ordinance only applies to that part of the right of way of the company between Twelfth and Forty-third streets and the alley adjacent thereto. Unless the company has undertaken to do the paving between Forty-third street and Sixty-third street, referred to in your letter, by contract with the city it can not be compelled to do this work.

We have made a careful investigation for the purpose of ascertaining whether there are any other ordinances than the one just mentioned, under which the South Side Elevated Railroad Company is required to do any paving underneath their structure and the alleys adjacent thereto, between Forty-third and Sixty-third streets and we have been unable to find any ordinances under which it can be required to do this.

Yours very truly,

MAX KORSKAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

MAY 25, 1914.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You referred to this department a copy of a letter from the sergeant in charge of the vehicle bureau addressed to the general superintendent of police relating to the abuse of dealers' demonstrating licenses on automobiles, with a note on same to the effect that you desire a statement from the law department as to what the demonstrating license provision of the code covers.

In response to same we point out below the substance of the provision in the ordinance to which you refer, and also call your attention to the distinction between the language of the code and that of the statute concerning manufacturers and dealers. The letter in question does not state under which of the two, prosecutions are started, and we have therefore taken both into consideration.

In the code, provision is made for the issuance of demonstrators' license plates for one purpose only. The applicant must state that he desires a license plate to be used by him

in "testing or demonstrating" motor vehicles upon the streets and "that he will use such license plate only for such purpose." When this is done he is entitled to the plate on the payment of one dollar and to two additional plates at the same price if he desires them, and a manufacturer whose plant is located in the city may have as many duplicates as he requires upon payment of one dollar for each.

There ought to be no difficulty in determining whether the ordinance has been violated or not. If any machine bearing such demonstrator's license plate is used on the streets for any other purpose than testing same or demonstrating it for the benefit of a prospective buyer or for the purpose of showing same to the public or individuals by way of advertisement, there is a clear violation of the ordinance, which appears as the second paragraph of section 2720. (Council Journal, January 22, 1912, p. 2609.)

It has been intimated that some doubt has been cast on the right of the city to enforce this ordinance by the case of *City of Chicago v. Francis*, recently decided in the Supreme Court. The first part of section 2720, so far as it relates to the display of numbered vehicle license tags on motor vehicles other than commercial vehicles, was held repugnant to section 12 of the statute which reads:

"* * * nor shall such owner be required to display upon his motor vehicle or motor bicycle any other number than the number of the registration seal issued by the Secretary of State."

It is contended that the same rule applies to demonstrators' license plates. We maintain, however, that the word "owner", as used all through the statute, has reference to a private owner of a car as distinguished from manufacturers and dealers in same, and we are satisfied that this view will be sustained by the courts. Therefore, in our opinion, the ordinance still stands and can be enforced.

So far as prosecutions under the statute are concerned, the enforcement of the penalty hinges on the following sentence, taken from section 5 of the act:

"Nothing in this subdivision shall be construed to apply to a motor vehicle operated by a manufacturer or dealer for private use or for hire."

It is stoutly maintained that the words "private use" refer only to such use as a person makes of same for his personal pleasure or convenience as distinguished from the use made by him in and about his business as a manufacturer or dealer.

While there is some point to this contention, we do not believe that it will bear any searching scrutiny. The provision for registration of manufacturers' and dealers' machines seems to include only such machines as are being handled for purposes of sale and in the course of trade. Section 5 permits manufacturers and dealers "instead of registering *each motor vehicle so manufactured or dealt in*" to apply for a general distinctive number for "all the motor vehicles owned or controlled by such manufacturer or dealer." It then goes on to state what the application should contain, among the requirements being a brief description of "each style or type of motor vehicle *manufactured or dealt in*," etc.

Such broad interpretation as the manufacturers and dealers are seeking to place on this section would permit them to use an entirely different type of vehicle in connection with their business and would render nugatory the provision for the description of the vehicles manufactured or dealt in.

In any event this provision is available only "instead of" registering machines "manufactured or dealt in" as distinguished from machines "used" by such manufacturer or dealer. In other words, it is the *machines* manufactured and dealt in that are excepted from the provisions of the act, and not the *use* which the manufacturer or dealer makes of machines in his control.

It has been suggested by a number of dealers who met with the Civil Service Commission and the sergeant in charge of the vehicle bureau, that some rules for the guidance of the police be outlined under which the dealer would have the right to use his dealer's registration number for all business purposes. This would not in any way interfere with the city ordinance or the collection of the full wheel tax, and possibly it is true, as represented, that it will result in no loss of revenue to the State. But whether that course is to be pursued or not is a question of policy with which the law department has nothing to do. So far as the statute and its enforcement

as it stands is concerned, the construction we place upon it will in all probability receive the sanction of the courts if the questions raised are threshed out.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

MAY 29, 1914.

HON. E. C. SHANKLAND, Chairman, Harbor and Subway Commission, Chicago, Illinois:

Dear Sir:

In reply to your request for an opinion relative to contract for superstructure of Pier No. 2 in Harbor District No. 1 of the City of Chicago, we beg to advise you as follows:

On the 6th day of May, 1914, the commission, by resolution, awarded the contract to The Warner Construction Company, on the theory that it was the lowest responsible bidder for the entire work including the alternate proposal. The contractor is required to execute a contract pursuant to this award and furnish a bond for half of his bid within ten days.

The Warner Construction Company did not execute such contract or furnish such bond on or before the 16th day of May, 1914, and therefore defaulted and subjected its deposit of \$30,000 to forfeiture.

It may be contended, however, that inasmuch as The Warner Construction Company asked the commission to elect, with reference to the employment of the alternate plant and the commission did so elect on the 14th day of May, 1914, that thereby The Warner Construction Company had ten days from that date within which to sign the contract and furnish the bond.

As to this proposition, we are of the opinion, first that the election of the commission on the 14th, as above stated, did not have the force of extending the time within which the contract should be signed and the bond furnished. But even if the law were otherwise and The Warner Construction Company had ten days from the 14th within which to sign the

contract and furnish the bond, nevertheless that time expired on Sunday, the 24th day of May, 1914, and the company did not, before such date of expiration, sign the contract and tender the bond.

It may be contended that inasmuch as the last of the ten days now under consideration fell on Sunday, that the company had all of the following Monday, or the 25th of May, within which to act.

The rule is, that where a party is required to perform a certain act within a fixed number of days, he must perform that act within the number of days limited, notwithstanding the fact that the last day falls on Sunday, unless there is some provision in the contract or statute pursuant to which the act is to be performed that gives an additional day in case the last day falls on Sunday.

There is nothing in the contract, proposal, plans or specifications under consideration which allows an additional day to The Warner Construction Company.

While there are numerous statutory provisions with reference to extending the time within which a party may act when the last day falls on Sunday, none of these provisions apply to the one under consideration. We are therefore of the opinion that the ten days within which the contractor was required to sign the contract and furnish the bond, on the hypothesis that the time began to run from the 14th day of May, 1914, expired on the 24th day of May, 1914, notwithstanding the fact that that day was Sunday. But even if the rule were otherwise and the contractor had the 25th within which to act, it is our opinion that he is still in default, because he did not present to or file with the commission or any one thereof the contract or bond in question. It is true, that in some way or other, some time before nine o'clock on the morning of the 26th of May, 1914, certain papers, that it may be contended by The Warner Construction Company were such a contract as should be furnished and presented to the commission, were placed on the desk of the chairman of the commission.

We are advised that the office hours of the commission are from nine o'clock in the morning until five o'clock in the

evening, and that those offices were open until some time after five o'clock, and the chairman of the commission was in his office prepared to attend to any business of the commission that might arise. We are therefore of the opinion, that even if the contractor had up to and including the 25th of May within which to furnish the commission with the bond and contract in question that it failed to do so under the circumstances above stated.

We need not stop at any of the points above mentioned, however, because under the terms of the proposal (page 4) a contractor is required to furnish a bond to be approved by the commission in a sum equal to one-half of the amount of the contract. The amount of the contract in this case, if executed, would have been \$1,067,984.00. The penalty of the bond, which was unceremoniously dumped on to the desk of the chairman of the commission at some time or other, is \$533,992.00.

We turn now to the schedules of the sureties who are supposed to have signed the bond in question, and we find that the total amount scheduled by the sureties is about \$34,000.00, but inasmuch as the city in accepting personal surety bonds requires that the sureties schedule double the amount of the penalty of the bond, we assume that the commission would not consider the bond of such a nature as they would care to approve.

Looking to the bond again, we find that no sureties are named in the body of the bond. We further find that the bond is not signed under seal by the major portion of the sureties. We further find that the execution of the bond is not acknowledged as the form requires.

We might conduct our investigation further and assign additional reasons why the contractor to whom the award is made has failed to carry out the terms of the proposal. We are therefore of the opinion that your commission should pass a resolution forfeiting the \$30,000.00 accompanying the bid of The Warner Construction Company.

This brings us to the second general subject-matter of our inquiry, that of awarding the contract to some other bidder, and in the consideration of this subject, the question that arises primarily for our consideration is, must the commis-

sion award the contract to the next lowest responsible bidder or must it readvertise for bids or may it, at its own option, do either one or the other.

We regret to state at the outset of this opinion on this subject, that we have not been favored by either the Supreme or Appellate courts of this State with any decisions clearly in point on the subject now under consideration.

Some years ago, the legislature passed what was then termed a Local Improvement act, but which act, with the exception of two sections, the Supreme Court held invalid for constitutional reasons. The Supreme Court of this State, in *City v. Hanreddy*, 211 Ill. 24, held that notwithstanding the fact that section 50 of the act in question appeared in the Local Improvement act, it nevertheless applied to all contracts, whether they pertained to local improvement or otherwise and that therefore in letting contracts for whatsoever purpose, the city was required to solicit bids if the amount to be expended exceeded \$500.00. After the Supreme Court had held the major portion of the Local Improvement act invalid, the legislature enacted a new Local Improvement act making a part thereof section 74 which embodied language very much the same as section 50 of the old improvement act which was held unconstitutional as above suggested. It will therefore be seen that we have on our statute books, section 50 of the old Local Improvement act and section 74 of the new Local Improvement act.

After the passage of the new Local Improvement act and in 1911, the legislature amended section 50 of the old Local Improvement act so as to make it apply clearly to work other than that provided for under the Local Improvement act. It is thus seen, that it was the legislative intention to clearly divorce section 50 of the old act from section 74 of the new act.

If we were considering a local improvement contract, our troubles would be at an end by virtue of section 81 of the present Local Improvement act, which provides that in case of the failure of the successful bidder to enter into the contract after the award thereof is made to him, the Board of Local Improvements shall again advertise for bids.

We are of the opinion that notwithstanding the fact that

the Supreme Court in the Hanreddy case, above referred to, held section 50 of the Local Improvement act to be applicable to all contracts, that in view of the enactment of the new Local Improvement act and the complete change in old section 50 in 1911 that the Supreme Court would not hold section 81 of the Local Improvement Act applicable to all contracts. This brings us to the consideration of another question in this connection and that is, has there been any policy established, either in the State or in the city, that could be considered as controlling in the premises.

We are advised that it has been the practice for many years in the office of the commissioner of public works, in cases where the successful bidder fails to enter into a contract, to award the contract to the next lowest responsible bidder if his bid is within the estimate, of the city engineer, of the cost of the work. On the other hand, such policy as you may find outside of the city, seems to be that established by the legislature through the enactment of section 81 of the Local Improvement act. These two policies, as will be readily observed, are in direct conflict, so our decision cannot well hinge alone on the question of established policy.

An examination of the proposal and specifications under consideration, discloses the reservation to the commission of the right to reject any or all bids. In view of this reservation and other facts, there is no question in our mind, but that the Harbor and Subway Commission have the right, if in their judgment they see fit so to do, to reject all of the bids except that of The Warner Construction Company and order a readvertisement for bids.

Before passing from the subject of the bond, however, you might add that in view of the fact that you have ascertained the values of the property scheduled and that you are of the opinion that based upon the fair market value of the property so scheduled with the deductions shown by the schedules for encumbrances, that the property so scheduled does not exceed about one-half of the penalty of the bond. When it is the practice of the city in taking personal bonds which require property to be scheduled by sureties, that equals double the amount of the penalty, you would, for that reason alone, be justified in rejecting the bond, forfeiting the

deposit and proceeding in some manner to award the contract to another bidder.

When we come, however, to the question of the right of the commission to award the contract to the next lowest responsible bidder, we encounter more serious difficulties and are driven to an examination of the decisions of other states to find authority upon which to base our conclusions.

The theory has been advanced in some of the cases that in awarding a contract the power to act with reference to the bids is exhausted, but it seems to us that the rule is that in the absence of some controlling feature of a statute or ordinance the power, with reference to letting contracts on bids, is not exhausted by an award, but on the contrary it is a power that continues until a contract is consummated. This is largely due to the fact that the awarding of a contract is not the making of a contract where the proposal contemplates the formal execution of a contract.

Wheaton, etc. v. City, 204 Mass. 218;

Gibson v. Owens, 115 Mo., 258.

We believe that a fairly safe ruling for guidance is laid down in *Corry v. Corry Chair Co.*, 18 Pa. Supr. Ct. Rep. 271, wherein the court, at page 281, says:

“The provisions of no statute applicable to the City of Corry were violated and no fraud is alleged in the letting of the contract under which the work was done. Such being the case, no valid objection to the assessment can be based on the fact that after the lowest bidder had withdrawn his bid and refuses to enter into a contract, the contract was entered into with the next lowest bidder.”

In harmony with the rule as thus announced, we find *Twiss v. City*, 63 Mich. 528, wherein the court found that there was collusion between the two bidders in question constituting fraud and, therefore upheld the action of the council in rejecting all bids and readvertising for bids.

In keeping with the case, last referred to, is *Crabtree v. Gibson*, 78 Ga. 231, where the court found that there was collusion between the lowest bidder and the next lowest bidder whereby it was understood that the lowest bidder should refuse to accept the contract which was awarded to

him in order that it should be let to the next bidder. In that case the court enjoined the payment to the second bidder, whose bid was \$500.00, of more than the amount of the first bidder's bid, which was \$350.00.

It is, of course, easy to see how a number of bidders could combine to defraud the city if the law required that the contract must be let to the second lowest where the first refused to enter into a contract. For instance, if the amount required to be deposited by each bidder was \$25,000.00 and the lowest bidder bid \$375,000.00, the next bidder \$400,000.00, and the next bidder \$425,000.00 and the next \$675,000.00, it would be easy for the bidders to agree among themselves that the first three would in turn refuse to accept the contract awarded to them and respectively forfeit their \$25,000.00 deposit and force the awarding of the contract to the highest bidder at \$675,000.00, with the understanding the highest bidder would reimburse them for the amount they had forfeited and pay them a bonus in addition thereto, which he might be able to do and still make a handsome profit, if the mesne bid of the three lowest bids approximately represented the cost of construction.

Of course, the object of the rule laid down in the Pennsylvania case, to which we have just made reference, is that it is difficult to detect fraud and that it is quite possible for fraud to be perpetrated without the authorities, who are awarding the contract, being aware of it.

The court, in *Huston v. Comrs.*, 15 Ohio Dec. 231, attempts to answer the argument above suggested and in so doing, at page 233, says:

“In the absence of any circumstances of collusion, and in the event that the lowest bidder fails to act, can the county commissioners award the contract to the next lowest bidder, or are they required to readvertise for bids?

“The argument is very strongly advanced that under no circumstances should the county commissioners be permitted to award a contract in such case to the next lowest bidder but that they ought to readvertise for bids again, for the reason that to open the door of procedure will be to permit, in a great many cases, collusion, whereby parties will purposely bid high and low and then have the lower bid withdrawn for the purpose

of securing higher prices; that this danger is so great that it should be the policy of the law to absolutely forbid such action altogether rather than to permit it in the cases in which no actual harm might be done. That the commissioners, in advertising for bids and making contracts must exercise some discretion, is most apparent. They must see that the contract itself properly carries out and covers all the subject matters contained in the bid. They must judge as to the sufficiency of the bond and of the sureties offered, etc. *Boren v. Darke Co.*, (Comrs.) 21 Ohio St. 311.

* * * *

“Against this claim that the door of opportunity for collusion should be shut altogether, thereby preventing any such collusion, must be urged not only the presumption that the commissioners will exercise their discretion properly, but the further fact that that discretion is always subject to review and consideration by the courts, and further must be considered the fact that a great many contracts, such, for instance, as the one at bar, require immediate and urgent fulfillment, and the expense of readvertising in such case and the delay incident thereto would be at the loss of the county, while it would be highly improbable that there would be any difference in the amounts of the bids.”

State ex rel., etc. v. Comrs., 26 Ohio St. 531, sanctions the awarding of a contract to the next lowest bidder when the one preceding him has been awarded the contract and refuses to enter into the agreement in writing. But the wording of the statute which controls that decision does not render that case particularly applicable to the matter under consideration.

Gibson v. Owens, 115 Mo. 258, fits the facts which we have before us much more closely than most of the cases to which our attention has been directed, in that the law in that case required that the contract be let to the lowest reliable and responsible bidder who will sufficiently guarantee the performance of said work, whereas under the law applicable to the facts before us the contract is required to be let to the lowest responsible bidder. It was held in the Missouri case that where the contract had been awarded to the lowest bidder and he failed and refused to enter into a contract, that it was proper for the engineer to award the contract to the

next lowest bidder, but in that case the action of the engineer in so awarding the contract was confirmed by the council.

It will be observed, however, in the Missouri case, the requirement that the bidder sufficiently guarantee the performance of the work was an element that was lacking as to the first bidder altogether, so that it in effect made the next bidder, who could give such guarantee, the only one to comply with the law.

In *Water Co. v. Ogden City, etc.*, 62 N. J. L., 588, the court approved of the plan of readvertising for bids before awarding the contract after the first person, who had been awarded the contract, failed to sign such contract.

In *Park Comrs. v. Carmody*, 139 Ill. App. 635, the court impliedly approved of the letting of a contract to the next lowest bidder where the person to whom it had been first awarded failed to enter into the contract, but the question was not specifically raised or decided.

People v. Kent, 160 Ill. 655, and *Johnson v. Sanitary District*, 163 Ill. 285, are cases where the subject of municipal contracts was involved, but where against the specific question under consideration was not determined.

After a careful consideration of the authorities bearing on the subject, we feel forced to conclude that inasmuch as old section 50 of article IX of the Local Improvement act, as amended in 1911, provides that when the expense of any work or public improvement exceeds \$500.00, the contract shall be let to the lowest responsible bidder *in the manner prescribed by ordinance*, that it is for the council to say by ordinance whether under the circumstances now being considered the contract should be awarded to the next lowest responsible bidder or there should be a readvertisement for bids. It might well be that the council could by ordinance authorize the Harbor and Subway Commission to use their judgment and discretion in the premises, but the fact remains that the council has not prescribed by ordinance what shall be done under the existing circumstances, nor has it by ordinance authorized the commission to act in the premises.

We, therefore, advise you that the matter should be laid before the city council in order that it may pass a general ordinance pertaining to the subject, or pass an ordinance ap-

plicable to the particular case, wherein they shall direct that the commissioners proceed to award the contract to the next lowest bidder or readvertise, as the case may be.

Yours respectfully,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

MAY 29, 1914.

HON. CHARLES H. WACKER, Chairman, Chicago Plan Commission, Room 314, Hotel La Salle, Chicago:

Dear Sir:

We are in receipt of your communication of the 15th inst. requesting an opinion "as to whether it would be possible, by any act of the city council, to have set aside, or appropriated, or designated, from the city's Traction Fund, the necessary amounts for subway development on Robey street and on Ashland avenue in advance of any general subway plans having been adopted by the city."

The traction ordinances of February 11, 1907, provide that the so-called Traction Fund "shall be kept and used for the purchase and construction of street railways by said city."

In the case of *Barsaloux v. City of Chicago*, 245 Ill. 598, the court, upon page 611, said that the city would have no power to divert the Traction Fund to general corporate purposes, but that the construction of subways is the construction of street railways and that using the Traction Fund to construct subways would not be a diversion of such fund.

There is nothing in the 1907 ordinances, or elsewhere, which limits the right of the city to use the Traction Fund for street railway purposes until the adoption by the city of a general subway plan, and we are of the opinion that the Traction Fund may be used for the purpose of constructing subways as the city may from time to time determine in advance of the adoption of any general subway plan.

Your communication does not indicate the location of the subway in Robey street and Ashland avenue, which you

have in contemplation. The board of supervising engineers in their communication to the committee on local transportation of the city council, published January 15, 1914, entitled, "Initial routes for surface line subways provided for in the 1907 traction ordinances, as recommended by the board of supervising engineers October 29, 1913, and supplemental recommendations on additions and extensions," recommended the following routes on Robey street and Ashland avenue, to wit:

Robey Street—From George street to West Fullerton avenue, and from Blue Island avenue to West 33rd street; and from West 38th street to West 47th street.;

Ashland Avenue—From Fullerton avenue to Clybourn place (now Courtland street).

Each of said four routes passes under the Chicago River and, while they are in the line extended of Robey street and Ashland avenue, respectively, a considerable portion of each of the proposed routes lies through private property, where Robey street and Ashland avenue have not been opened.

As above stated, the Traction Fund can only be used for the purchase and construction of street railways by the city. Ordinarily, a street railway is constructed in a public street or highway. Our Supreme Court has held, in proceedings to condemn private property for street railway purposes, that, in order to sustain a petition to condemn, there must be clear showing of a necessity for leaving the highway and resorting to private property. The cases in which condemnation of private property for street railway purposes has been allowed by our courts, have been cases where, in the construction of the road in the highway, difficulties or obstructions were encountered, which rendered it impracticable to construct or operate the road in the highway.

Harvey v. Aurora & Geneva Ry. Co., 174 Ill. 295;

Aurora & Geneva Ry. Co. v. Harvey, 178 Ill. 477;

Dewey v. C. & M. Elec. Ry. Company, 184 Ill. 426;

Harvey v. Aurora & Geneva Ry. Co., 186 Ill. 283;

Knopf v. Lake St. El. R. R. Company, 197 Ill. 212;

Eddelman v. Union Traction Company, 217 Ill. 409.

While a situation similar to the one presented in the contemplated Robey street and Ashland avenue subways has

not been considered or passed upon by the courts, and the question is by no means free from doubt, we are inclined to the opinion that if the city council shall be of the opinion that the public convenience requires subways connecting the opened portions of Robey street and Ashland avenue, the same to be leased to and used by the surface street railway companies in connection with their street railway system, and shall pass an ordinance providing therefor, then, the city would have the right to acquire by purchase or condemnation such property or interests therein as would be necessary for the construction of such subways, and the city would have the right to use the Traction Fund to pay for such property or interests therein and to pay for the construction of the subways.

If Robey street and Ashland avenue should be extended so as to include the sections through which the contemplated subways would run, the city could then construct the subways in like manner as in other streets.

Yours respectfully,

BRYON Y. CRAIG,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

JUNE 1, 1914.

HON. L. E. MCGANN, Commissioner of Public Works:

Dear Sir:

The letter of Mr. Joseph O. Kostner, Deputy Commissioner of Public Works, dated May 26, 1914, transmitting a copy of the report of the assistant harbor master at South Chicago in the matter of dumping in Lake Michigan, and asking for suggestion and advice, has been referred to the writer for reply. Your department desires to know whether you have authority to enforce the ordinance of January 26, 1914, "when it would require material to be carried beyond the Indiana State line produced."

The City of Chicago has no jurisdiction to enforce its ordinances within the boundary limits of the State of Indiana,

and can only enforce them within the limits of this State and within the limits as laid down in said ordinance.

In advising you, it is of interest, however, to know exactly what are the boundary limits of the two States, and I accordingly set forth the boundaries of Illinois, as follows:

“The boundaries and jurisdiction of the state shall be as follows, to wit: Beginning at the mouth of the Wabash river; thence up the same, and with *the line of Indiana, to the northwest corner of said state; thence east, with the line of the same state, to the middle of Lake Michigan; thence north, along the middle of said lake, to north latitude 42° and 30’*; thence west to the middle of the Mississippi river, and thence down along the middle of that river to its confluence with the Ohio river, and thence up the latter river, along its north-western shore, to the place of beginning; *Provided*, that this state shall exercise such jurisdiction upon the Ohio river as she is now entitled to, or such as may hereafter be agreed upon by this state and the state of Kentucky.”

From the underscored portion of said boundaries, it will be observed that the eastern boundary of Illinois follows “the line of Indiana, to the northwest corner of said state,” and then, instead of producing this line due north, the boundary line of Illinois proceeds at right angles “thence east, with the line of the same state (Indiana), to the middle of Lake Michigan; thence north, along the middle of said lake, to north latitude 42° and 30’.”

The northwestern corner of the State of Indiana, or the point where the west boundary line of said State strikes Lake Michigan, is just south of 102nd street, produced to the water's edge, and this is the point where the boundary line of the two States changes to a due east direction at right angles with the north and south boundary line between the two States. It is therefore apparent that any dumping north of this line, under the provisions of the ordinance, would have to be carried out into the lake the full distance required by the ordinance. South of this line, the waters of Lake Michigan are within the boundaries and jurisdiction of the State of Indiana, and over such area the ordinance is not operative.

In order to prevent dumping in the Indiana portion of the lake, I suggest that you call the matter to the attention

of the United States District Engineer, as the Mann Act, which contains the eight-mile limit, applies also to the portion of Lake Michigan in front of the County of Lake in the State of Indiana, as well as to the portion of the lake in front of the County of Cook in the State of Illinois, and, if the eight-mile limit provided by the Mann Act is enforced in front of Lake County, Indiana, this will very likely carry the dumping more than eight miles from South Chicago, owing to the narrow area of that portion of the lake within the State of Indiana.

I suggest that you also take up the matter with the authorities of the State of Indiana. It may be that there are Indiana statutes or ordinances bearing upon this question, which, if enforced, will tend to preserve the lake from contamination.

I return herewith copy of report of assistant harbor master, dated May 22, 1914, and copy of said ordinance of January 26, 1914.

Respectfully submitted,

JOHN G. SKINNER,

Assistant Corporation Counsel.

Approved:

J. W. BECKWITH,

Acting Corporation Counsel.

JUNE 2, 1914.

HON. WILLIS O. NANCE, M. D., Chairman, Sub-Committee of
Committee on Judiciary.

Dear Sir:

You ask to be informed as to the legal effect of the proposed amendments to the first part of Section 1532 of The Chicago Code of 1911 embodied in the majority report of the Committee on Judiciary, etc., recently presented to the City Council and re-referred to the committee. At the time the matter was before the City Council an amendment was passed prohibiting signs indicating an entrance for women, and we assume that you do not inquire about that portion of the section, but only wish to be informed concerning such parts of same as have to do with the amendments now under consideration.

The portion of the proposed amendatory ordinance about which you inquire reads as follows:

“1532. Winerooms Prohibited—*Private Entrance Signs.* No person operating, maintaining or conducting a saloon, dramshop or other place in which malt, vinous, spirituous or intoxicating liquors of any kind whatsoever are sold, given away or otherwise dealt in, shall establish or maintain in *or in* connection with such saloon, dramshop or other place, either as a part thereof or as an adjunct thereto, any wineroom, *stall, lodge,* or private apartment of any kind or construction whatsoever; *nor shall such person so operating, maintaining or conducting such saloon, dramshop or other place in which said liquors are sold, given away or otherwise dealt in, as aforesaid, establish or maintain, either temporarily or permanently, in such saloon, dramshop, or other place, any part thereof which is shut off at any angle from the general public view by doors, curtains, screens, partitions, stalls, booths, or other arrangement or device of any kind whatsoever.* * * *”

We have underscored the words which are added to the present ordinance by the proposed amendments. The only words eliminated from the present ordinance are “the interior of,” now appearing after the words “private apartment” and before the word “which”.

The additions proposed and the elimination of the words above mentioned, taken in connection with the punctuation in the new draft, have the effect of abolishing winerooms as well as stalls, lodges, etc., altogether and contemplate a change in the interior of the main room of the dramshop.

That part of the ordinance which precedes the semi-colon prohibits winerooms and stalls or compartments of any kind in any dramshop. This includes restaurants, cafes, dining rooms and other like places, and it therefore conflicts with Section 1533, immediately following this, which prohibits the serving of liquors in any private apartment connected therewith to parties of less than four unless all the members of such party, if less than four, be of the same sex.

In view of this inconsistency, it is uncertain how the new provision would be construed. It might be said by the courts, if a test were made, that the new ordinance supercedes the provision in regard to private apartments in res-

taurants, cafes, dining rooms and other like places, and that these would be altogether prohibited by it. On the other hand, the court might say that it was intended by the City Council that these private apartments are an exception to the general rule and may be conducted in the manner prescribed in section 1533. If the proposed ordinance becomes a law and the courts take the first view, there can be no such thing as service in a private dining room connected with a restaurant where liquors are sold, even if no liquors are served in these apartments; since the wording of the proposed ordinance prohibits a private apartment of any kind in connection therewith.

There are two ways of overcoming this inconsistency so as to leave no doubt as to the meaning. They depend on what the City Council has in contemplation. If it intends to prohibit dining rooms in restaurants, etc., then Section 1533 should be amended as well as Section 1532. If it intends to permit such private dining rooms in restaurants, then Section 1532 should be amended by substituting the words "saloon, bar room or tippling house" in place of the words "saloon, dramshop or other place in which malt, vinous, spirituous or intoxicating liquors of any kind whatsoever are sold, given away or otherwise dealt in." This distinction is made in a number of places in the ordinances relating to the sale of liquor, although all such places are dramshops. In other words, the term "dramshop," as used in the ordinances, includes every saloon, bar room or tippling house, but the words "saloon, bar room or tippling house," do not include every dramshop.

The question has arisen whether the proposed ordinance, in prohibiting "private apartments of any kind or construction whatsoever," will be construed as prohibiting such rooms as private offices, toilet rooms, storage rooms, etc., in a dramshop.

We do not think that such an interpretation can be placed upon these words, for while they are comprehensive and sweeping, we are satisfied that they will not be so interpreted as to lead to an absurdity on the one hand, and on the other hand the doctrine of *ejusdem generis* will apply. This doctrine is to the effect that when words designating

a class or species are used, followed by general words, the latter will be construed as relating to the species or class first mentioned. Hence, these general words will be held to relate to the class specified by the words "winerom, stall, lodge" which they follow, and will not be interpreted as prohibiting any room set apart for purposes other than the sale of liquor, such as an office, store room or toilet room.

It is our opinion, however, that the words "stall, lodge" and the words following same will have the effect of abolishing such compartments as are divided off in many dramshops by settees or benches with high backs, as well as private compartments which are entirely open on the side facing the main room. It is in this respect that this portion of the proposed ordinance differs from the present ordinance, since the present ordinance permits such stalls if open on one side so that the interior is exposed to an unobstructed general public view from the main room.

Passing now to the second part of the proposed ordinance, it would seem that the purpose of that is to keep the dramshop within the limits of a room where all parts of same can be seen from any position occupied by the observer. A strict construction of the words used would prohibit the use of an L shaped room for a dramshop. Such a combination of rooms as exists in many of the downtown restaurants where liquors are served would be contrary to the ordinance, since the word dramshop includes these. All the business of such a place would have to be done in one room either rectangular or of such shape that the whole of the interior can be seen immediately upon entering same. In fact, a literal interpretation of these words would forbid the placing of a screen before the entrance way to same, which would have the effect of exposing the whole of the interior to any one looking into the door from the outside. About the only modification that could be conceived is that a portion of the room might be obstructed from such general view by the bar—and this modification would be permissible only on the theory that since the person conducting the place is licensed to do business he would necessarily have to be permitted to construct a bar somewhere. We are not certain, however, but that even a stricter construction of the ordinance might be enforced,

and in that event the bar would have to be so built that it will occupy an end or corner of the room in such a way that no angle will be formed behind which a table or chairs can be placed that can be occupied by persons who are not in full view. If it is designed to limit the application of this prohibitive feature to saloons, bar rooms and tippling houses as distinguished from restaurants cafes and dining rooms, the wording would have to be changed.

We understand the above points to be the ones on which you desired information so that your committee might act with a full understanding of the legal effect of the proposed amendments.

We return herewith the original ordinance introduced by ex-Alderman Freund and the majority and minority reports from the Committee on Judiciary.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

JUNE 2, 1914.

SPECIAL PARK COMMISSION, City of Chicago:

Gentlemen:

We have a communication from your secretary requesting an opinion as to the propriety of the practice of giving or lending any of the commission's apparatus or salaried employes to such individuals, civic organizations or charitable institutions as apply for them.

There can, perhaps, be made a distinction between the loaning of apparatus and loaning the services of salaried employes. With respect to the former I see no particular objection to the reasonable exercise of the commission's courtesy in temporarily accommodating charitable and similar institutions with play apparatus for which the commission has at the time no present need. A rather strict supervision should, however, be maintained over this practice to see that it is not abused and careful attention paid to the proper return of all property so loaned.

I think the question of the loan of the services of salaried employes, however, stands upon a different basis, as the compensation of these employes is paid directly by the city of Chicago from and through its revenues and such revenues, either in their original form or when ultimately used for employes' services, cannot be diverted from the city's use. As has been well said by our Supreme Court:

"The revenues of a city cannot be donated by the officers of the city, or by the city council, to any person they may think entitled to the same, but, on the other hand, such revenues can only be paid out or appropriated by the city council or its officers in the manner and for the purposes authorized by law."

Washingtonian Home v. Chicago, 157 Ill. 414, 429.

Apart from the legal aspects of the situation, it is difficult to understand how the services of salaried directors or employes of the commission can be loaned or disposed of elsewhere without the work of the commission feeling the loss occasioned by their absence. It is assumed, of course, that these directors and employes have their time fully occupied by their work on the commission and that their employment elsewhere would result in the deprivation of the commission of a certain portion of their actual services.

Concerning the practice of transferring the services of these employes and directors from the branch or department of the city by which they are paid to the services of charitable or other organizations which bear no part of their expense, I am plainly of the opinion that this cannot be done in any legal manner.

As above indicated, your commission may, in the exercise of a reasonable discretion, permit the loaning (not giving) of its apparatus or playground fixtures for such temporary periods as will not inconvenience the public using your playgrounds, with the understanding, however, that the return of all such property must be carefully provided for, as in the event of loss or non-return of the same there might be cast a legal liability for the value of such property against the commissioners individually.

Yours respectfully,

J. W. BECKWITH,
Acting Corporation Counsel.

JUNE 3, 1914.

HON. L. D. SITTS, Chairman, Committee Gas, Oil and Electric Light:

Dear Sir:

We are in receipt of a communication from Hon. Francis D. Connery, City Clerk, stating that he has been directed by your committee to request the corporation counsel to advise the committee as to the powers of the city in respect to violations by the Peoples Gas Light and Coke Company of the so-called "gas quality" ordinances.

If the State Public Utilities Commission act which was approved June 30, 1913, and went into effect January 1, 1914, or that portion of said act relating to the fixing of rates and standards for gas, is valid, then the power to determine and fix such rates and standards and to enforce conformity thereto is now vested in the State Public Utilities Commission.

In our communication to you of March 28th in regard to the city's suit to enforce the provisions of the gas rate ordinance of July 17, 1911, we stated that much doubt existed as to the constitutionality and validity of the State Public Utilities Commission law, and the validity of the appointment of the members of the commission without confirmation by the senate and while the legislature stood adjourned, and that the city council on December 29, 1913, had directed this department to institute such proceedings as should be necessary to determine the validity of said law, and that circumstances were developing which would probably afford a basis for such a proceeding.

We further stated in said communication that if the State Public Utilities Commission law was valid the power to fix gas rates and standards was apparently now vested in the commission, and the city council no longer had such power; and, on the other hand, that if said law was invalid then the city retains the power to fix gas rates which it formerly possessed under the act of the legislature approved May 18, 1905 entitled, "An Act to confer upon the City of Chicago the power and authority to sell surplus electricity and to fix the rates and charges for the supply of gas and electricity

for power, heating and lighting furnished by any individual, company or corporation to said city of Chicago, and the inhabitants thereof." (Hurd's R. S. 1911, p. 449.)

While said act does not in terms confer upon the city the power to determine and fix standards of service, such as purity of gas, illuminating power and pressure, nevertheless, these standards are so vitally connected with the price of gas that we are inclined to the opinion that the power to prescribe maximum rates and charges for gas would include the power to fix such standards.

The mayor and chairman of the Transportation Committee of the City of Berwyn, Illinois, recently filed a petition before the State Public Utilities Commission against the Chicago Railways Company, placing before the Commission the street car situation as it is alleged to exist in the City of Berwyn and asking for certain relief in regard thereto. By order of the Commission, the City of Chicago was made a party respondent to said petition, and has filed its answer thereto attacking the constitutionality of the said State Public Utilities Commission Act. This cause is set for hearing before the Commission on June 23rd.

In view of the present uncertainty (resulting from the passage of the State Public Utilities Commission Law) in respect to whether the power to determine and fix standards for gas and to enforce conformity thereto, is now lodged in the city or in the Commission, and further in view of the pending proceeding involving the constitutionality of said act, we think that it would be advisable to await the determination of said question by the courts before attempting to enforce the "gas quality" ordinances by prosecutions for violations thereof.

In addition to the foregoing which relates to the question of the city's power in respect to fixing and enforcing gas standards, your attention is directed to the obligations and liability of the Gas Company in respect to quality of gas, growing out of the provisions of "An Act in relation to gas companies," approved June 5, 1897, in force July 1, 1897, commonly called the "Gas Consolidation Act."

Section 11 of said act provides that any corporation pur-

chasing or leasing the property of any company or companies, or into which any company or companies are consolidated and merged under said act, shall not increase the price charged by it for gas *of the quality* furnished to consumers during any part of the year immediately preceding such purchase or lease, or such consolidation or merger, and that such corporation shall furnish gas to consumers as *good in quality* as it furnished previous to such purchase or lease, or such consolidation or merger.

Section 12 of said Gas Consolidation act is as follows:

“§12. Any company violating either of the provisions of the preceding section shall be liable in damages therefor to the person aggrieved, and shall, for each offense, forfeit two hundred dollars, to be recovered in an action of debt, in the name of the People of the State of Illinois, or by any person who may sue for the same. Such company shall also be liable to proceedings in *quo warranto*, for violation of either of said provisions, and if adjudged guilty, the court may give judgment of ouster from its franchises, unless the company shall cease and discontinue such violation, as and when determined by the court.

“And any director or directors, officer or officers, or agent or agents, of such company who shall wilfully and knowingly violate, or be concerned in the wilful violation of either of the provisions of the preceding section, shall for each offense, forfeit one thousand dollars, to be recovered in an action of debt, in the name of the People of the State of Illinois.”

In August, 1897 the Peoples Gas Light and Coke Company acquired and took over the property and plants of seven other gas companies, and in January, 1898 acquired and took over the property and plants of two other gas companies, all situated within the limits of the City of Chicago.

Prior to said purchase or consolidation of said gas companies and on June 17, 1891, the city entered into an agreement with the Peoples Gas Light and Coke Company and six other gas companies then doing business in the city fixing the prices to be charged for gas from the date of the agreement until and “during the year 1897 and thereafterwards.” Said agreement also provided that the gas furnished should be of 24 candle power. (Council Journal of July 16, 1891, p. 505.)

The price (\$1.00 per 1000 cubic feet) and the candle power (24 candle power) prescribed in said contract of June 17, 1891 were evidently the price and candle power in effect in August, 1897 when the gas companies were acquired by, or consolidated or merged into, the Peoples Gas Light and Coke Company as aforesaid.

The Gas Company in its petition to review and determine rates for gas filed in the Circuit Court of Cook County July 31, 1911 alleged "that it is required by the laws of the State of Illinois to furnish consumers 24 candle power gas." The same allegation was contained in the Gas Company's bill to restrain the enforcement of the gas rate ordinance of July 17, 1911, filed November 14, 1911 in the United States District Court for the Northern District of Illinois.

These allegations in the Gas Company's said petition and bill indicate that it recognized its obligation under the provisions of the Gas Consolidation act to continue to furnish gas to consumers as good in quality as it furnished previous to the consolidation, and that previous to or at the time of the consolidation it was furnishing 24 candle power gas.

Since the consolidation of the gas companies in 1897 the city council has passed various ordinances providing that all companies furnishing gas in the City of Chicago should furnish gas of not less than 22 candle power.

We are of the opinion that the Gas Company is obligated under the provisions of the Gas Consolidation act to furnish gas to consumers as good in quality as it furnished previous to the consolidation or merger, to wit, gas of 24 candle power (except in so far as the city may have consented to the Gas Company furnishing gas of less candle power) and that a failure on the part of the Gas Company to continue furnishing gas of said candle power would subject it to the liabilities provided in that behalf in the above quoted section 12 of the Gas Consolidation act.

Yours very truly,
BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

JUNE 3, 1914.

HON. EDWARD COHEN, City Collector.

Dear Sir:

Your letter of the 26th inst. asking for an opinion with reference to the liability of the city collector, city treasurer and the Illinois Trust & Savings Bank for loss or damages occasioned by the disappearance or nonpayment of a cashier's check on the Ogden Park Bank, has been handed to the undersigned for reply.

From the facts stated in your letter, we are informed that on April 29, 1914, the South Side Brewing Company deposited in your office \$4,000 in checks, of which \$1,000 was a cashier's check drawn on the Ogden Park Bank, signed by its cashier, dated April 27, 1914 and made payable to Edward Cohen, City Collector. This check together with seven others, was delivered by Albert Kraetsch to the South Side Brewing Company and by it to you, to arrange the details necessary for the issuance of two licenses for Mr. Kraetsch at 767 West 63rd street and 1444 West 74th street. Said check for \$1,000 was deposited by you with the city treasurer on May 21st, 1914, at 9 a. m. and has not been honored. The statement is made that the check was cleared through the Illinois Trust & Savings Bank, and in the letter of the Illinois Trust & Savings Bank to the city treasurer, it is stated that the First National Bank of Englewood, in behalf of said Illinois Trust & Savings Bank, presented this check to the Ogden Park Bank for payment, and the check was presumably extracted from other checks by some one at the Ogden Park Bank. The other checks accompanying the said \$1,000 check were paid by the Ogden Park Bank, but it does not appear what has become of the said \$1,000 check or who is responsible for its loss. The Ogden Park Bank since the date of the alleged presentment of said check has suspended payment, and for the purposes of this opinion we will assume that the check on the Ogden Park Bank has been lost, and also that it would not be paid if found and presented.

With these facts before us, you request an opinion as to the responsibility for the nonpayment or loss of said check, if lost,

—A—

WITH REFERENCE TO THE ILLINOIS TRUST & SAVINGS BANK;

—B—

WITH REFERENCE TO THE CITY TREASURER;

—C—

WITH REFERENCE TO THE CITY OF CHICAGO;

—D—

WITH REFERENCE TO THE CITY COLLECTOR.

—A—

As to the responsibility of the Illinois Trust & Savings Bank, will say that it is a well established rule that, where negotiable paper is deposited with a bank for the purposes of collection, the relation of principle and agent is created between the depositor and the bank, and not the relation of debtor and creditor.

Michie on Banking, page 1374.

Morse on Banking, Sec. 214.

If, on the other hand, the bank had used due care and diligence in forwarding the check and selecting the collecting bank, it is not liable to the payee for negligence or default of the collecting bank, since it is the agent of the payee.

Wilson v. Carlinville Natl. Bank, 187 Ill. 222, Aff. Ill. App. 364.

Watertown Milling Co. v. H. Kuenster & Co., 158 Ill. 259, Aff. 58 Ill. App. 61.

Aetna Ins. Co. v. Alton City Bank, 25 Ill. 243.

It is our opinion that the courts will hold that the Illinois Trust & Savings Bank used due care and diligence in forwarding the check to the First National Bank of Englewood, the latter bank being recognized as reliable and trustworthy, and that the Illinois Trust & Savings Bank by such a showing will exonerate itself from any liability. From the facts before us, however, we feel that it will not be so easy for the First Na-

tional Bank of Englewood to relieve itself from blame in this case.

The burden is upon a bank losing a paper sent to it for collection to show that it was not negligently lost.

Michie on Banking, page 1508.

First National Bank v. First Natl. Bank, 116 Ala. 520.

Chicopee Bank v. Philadelphia Bank, 8 Wall 641.

American Exp. Co. v. Parsons, 44 Ill. 312.

The First National Bank of Englewood having, from its own statement, lost this check, it is presumed to be negligent.

5 Cyc. 511, citing among other decisions the following Illinois cases:

American Express Co. v. Parsons, 44 Ill. 312.

McClure v. Osborne, 86 Ill. App. 465.

Morse on Banking, sec. 545.

There is, however, another principle of law in our opinion applicable to the facts here, namely: Our courts have repeatedly held that the sending of a check for collection to the bank upon which it is drawn, is negligence.

Drovers Natl. Bk. v. Provision Co., 117 Ill. 100.

First Natl. Bk. v. Bank of Whittier, 221 Ill. 319.

It is not reasonable care in selecting an agent to collect a debt, to select the debtor himself and place evidence of debt in his hands; a suitable agent must be some other than the party who is to make the payment. The courts also hold this on the theory that a debtor will not be presumed to use due diligence in paying his own debts when placed in his hands for collection. In the light of these decisions, The Englewood Bank may have considerable difficulty in convincing the courts that it used due care and caution in permitting these checks with others to be so placed under the control of the Ogden Park Bank that its officials could cause its loss or destruction.

Drovers National Bank v. Provision Co., *supra*.

First National Bank v. Bank of Whittier, *supra*.

German National Bank of Denver v. Burns, 12 Colo. 545.

Anderson v. Rogers, 53 Kans. 542.

Bank v. Goodman, 109 Pa. St. 428.

R. H. Herron Co. v. Mawby, 5 Calif. 39.

In conclusion we wish to say, it is our opinion that the Illinois Trust & Savings Bank is primarily responsible to the city for the loss of this check, and in case it exonerates itself, then the First National Bank of Englewood should be held liable for the loss.

—B—

As to the liability of the city treasurer, will say section 63 of the Chicago Code of 1911 provides:

“The city treasurer of the City of Chicago is hereby directed and required to deposit *daily* all moneys received by him as city treasurer during banking hours, and also such moneys as he may have received on the day previous after banking hours, in one of the banks which may have been designated by the city council as depositaries, * * *

From the statement contained in your letter and the letter of the bank, it is shown that the check was so deposited with the city treasurer on May 21, 1914 at 9 a. m. and that on the same day deposited by him with the Illinois Trust & Savings Bank (a designated depository). From these facts it is manifest that the city treasurer has in all respects complied with and acted strictly in conformity with his duties as designated by the code. This being true, it cannot be contended that there is any liability on the part of the city treasurer in this case.

—C—

As to the liability of the City of Chicago to Albert Kraetsch: Kraetsch deposited this check in payment of said saloon licenses. This check being so deposited with you for the purpose of paying for these licenses, it must be considered a conditional payment therefor.

See Morse on Banking, sec. 544.

30 Cyc. 1272.

The City of Chicago and its collector in receiving this check, acted as the agent for said Kraetsch in its collection. In the absence of negligence on your part, the check cannot be

considered a payment until actually paid by the bank on which it is drawn.

Morse on Banking, sec. 545.

It is, therefore, our opinion that you should not issue the licenses to said Kraetsch for which this check has been given, but that if Kraetsch has any claim the same should be diligently prosecuted in another law suit to recover from the person responsible for the nonpayment or loss of the check. The city has a right to assume that no payment has been made for said licenses and refuse to issue same.

—D—

As to the responsibility of the city collector in this matter will say, the only blame that can be attached to him, if any, may arise out of his failure to deposit the check within a reasonable time after its receipt. While it is the general duty imposed by law on the holder of a check to deposit the same within a reasonable time after the receipt of the same, otherwise the drawer may be released from responsibility (see Sec. 202, Chapter, 98 Hurd's Revised Statutes of Ill. 1912, (negotiable instrument act)), nevertheless, from the facts in this case it does not appear that the city collector has violated such a duty, nor does it appear that the neglect of the city collector, if any, has been the proximate cause of the nonpayment of the check.

This responsibility is one that can only be determined from the facts as they may be produced at a proper hearing before the court. With the meager evidence before us, we can hardly say that the City of Chicago or the city collector has been responsible for the loss or nonpayment of this check. At least, we cannot say so definitely until such time as the courts shall have determined the controverted facts in the matter.

You request further an opinion as to the feasibility of continuing the established custom of holding the checks deposited in your office until such time as licenses are issued. If such a custom is a convenience to your department, your rights can be properly protected by making a special agreement with the parties depositing checks in your office. An

understanding may be had that checks received by you are to be held simply for the convenience and at the risk of applicant for licenses; and until such checks are paid, no responsibility shall be placed on you or the City of Chicago for the nonpayment or loss of said checks.

If you feel that such an agreement, if drawn up by this department, will act as an accommodation for your office in the future, we shall be pleased at your request to draft form thereof.

Yours very truly,

LOUIS SALINGER,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

JUNE 4, 1914.

TO THE HONORABLE MAYOR AND THE CITY COUNCIL OF THE
CITY OF CHICAGO:

Gentlemen:

In 1909 there was passed a track elevation ordinance which authorized and permitted the elevation of certain railroad tracks, among them those of the Illinois Central Railroad Company and The New York, Chicago and St. Louis Railroad Company. This ordinance, by its terms, permitted the tracks of The New York, Chicago and St. Louis Railroad Company to pass under those of the Illinois Central Railroad Company in 79th street, thereby occasioning a depression in that street of 17 feet in order to secure the customary head room between the surface of the roadway of 79th street, as depressed, and the girder of the elevation of The New York, Chicago and St. Louis Railroad Company's tracks. This, in turn, necessitated an unusually long approach, approximately 600 feet, to the subway in 79th street, and necessitated a grade on said approach in excess of $3\frac{1}{2}$ per cent.

In 1912 the city council undertook to remedy this depression, together with the approach to the subway and the grade thereof by passing an ordinance providing that The New York, Chicago and St. Louis Railroad Company should

not cross beneath the tracks of the Illinois Central in 79th street, but that it should cross either over or under the tracks of the Illinois Central at some point south of 79th street but not in any public highway .

The United States District Court, in the first instance, and the United States Circuit Court of Appeals, in the second instance, held that this ordinance of 1912 was invalid inasmuch as it deprived The New York, Chicago and St. Louis Railroad Company of a contract right which was granted to it by an ordinance of 1909, whereby it was permitted to lay its tracks in 79th street beneath those of the Illinois Central Railroad Company, and that, therefore, it was invalid.

In discussing this question, the United States Circuit Court of Appeals, in its opinion, said :

“The other element in the 1909 ordinance is the exercise of police power. Though a railroad company may insist upon holding its perfected right of way latitudinally and longitudinally, a city in the interest of the public, if authorized by the state so to act, may enforce a shifting or an elevation of the tracks within the limits of the right of way upon or across a street. *C. B. & Q. R. Co. v. Chicago*, 166 U. S. 226; *C. I. & W. R. Co. v. Connersville*, 218 U. S. 336; *Grand Trunk W. R. Co. v. South Bend*, 227 U. S. 544. Undoubtedly the principal object of the 1909 ordinance was to command and control track elevation in the interest of public travel on 79th street. That legislation was under a power which would not be foreclosed by a contract to that effect, even if the City had not expressly reserved the power in the 1909 ordinance. But nevertheless the part of the ordinance that constitutes a grant of property rights must be upheld as fully as if the grant were in an ordinance by itself.

“No change in the 1909 plans and specifications of elevated structures over 79th street was made in terms by the 1912 ordinance. But the effect of that ordinance, if it had been accepted by appellee, or if the change of location of the right of way therein required could be enforced, would be to cancel the plans and specifications of the two-storied elevated structure, and, according to the evidence of the engineers, the erection of separate, single structures at the locations indicated would do away with a large part of the depression of 79th street, lessen and shorten the grades, and obviate the necessity

of pumping the surface water of the subway into the City's sewers. As the scope of an ordinance may properly be judged by its effect in operation (*Yick Wo v. Hopkins*, 118 U. S. 356), we deem the 1912 ordinance to be an attempt to exercise the police power with respect to the grade and drainage of 79th street and the elevation of railroad tracks thereover. It interfered with the use and enjoyment of the 1909 grant of the right to cross by offering as a substitute another grant and commanding that the latter alone be used, in order to improve 79th street; but it did not profess to be an appropriation of appellee's property within the meaning of the constitutional prohibition of the taking of property. It did not even prohibit or interfere with the use of the 1909 grant generally, but only in the way specified in the 1909 plans. But inasmuch as there was no lawful amendment of the 1909 plans, the part of the decree that commands the Commissioner to issue appellee a permit to erect a structure over 79th street in accordance with the 1909 ordinance was proper."

Briefly stated, we consider the force of the opinion of the United States Circuit Court of Appeals, referred to, to be that the city had a perfect right to require The New York, Chicago and St. Louis Railroad Company to so construct its tracks in 79th street that the depression therein would be less than 17 feet, and that the grade of the approaches to the subway in said street should be less than that provided for in the 1909 ordinance. Other authorities in support of this conclusion are:

C. B. & Q. R. R. Co. v. Chicago, 166 U. S. 226.

Baltimore v. Baltimore, 166 U. S. 673.

Wabash R. R. Co. v. Defiance, 167 U. S. 88.

C. & I. W. R. Co. v. Connersville, 218 U. S. 336.

Grand Trunk etc. R. R. Co. v. South Bend, 227 U. S. 544.

With the above mentioned idea in view, we, in the latter part of 1913, drafted, and thereafter on the 26th day of January, A. D. 1914, the city council passed an ordinance providing, in substance, that no depression greater than 10 feet below the surface of any street should be made by any railroad company in elevating its tracks across such street; and providing further that no grade exceeding 3½ per cent. should

be employed on any approach to any subway beneath any railroad track in any street.

We believe this ordinance to be valid, and, with that belief, presented it to the United States District court in order to procure a modification of the plans and specifications presented by The New York, Chicago and St. Louis Railroad Company for the work in 79th street, but that court clearly evinced a disinclination to enforce said ordinance, and stated that an order embodying that idea would be entered by said court on Wednesday the 11th day of June, A. D. 1914.

While we believe that the situation at 79th street with reference to track elevation has been, in effect, suspended in mid-air for an unusually long period, we also believe that a depression 17 feet in the street is a condition that should not be tolerated if there is any legal method by which it can be avoided. We further believe that on an appeal from the order proposed to be entered in the United States District Court on the 11th of June, we can procure a judgment of the United States Circuit Court of Appeals sustaining the validity of the ordinance of January 26, 1914, and thereby eliminate the 17-foot depression in 79th street.

We, therefore, lay these facts before you and ask your direction as to what action we should take in the premises.

Yours respectfully,

CHAS. M. HAFT,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 5, 1914.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

April 18th, 1914 your honorable body passed an order directing this department to prepare and submit not later than June 1, 1914 an ordinance preventing the storage of tar, tar products and other combustible and explosive material

within one mile of any residence or other building within the city limits. (C. J. pp. 355-6.)

Pursuant to said order we have examined the law enumerating the powers of the City Council and find that by virtue of clause 65 of section 1 of Article V of the Cities and Villages Act, the City Council has power—

“* * * to regulate and prevent the storage of gunpowder, tar, pitch, resin, coal oil, benzine, turpentine, hemp, cotton, nitroglycerine, petroleum, or any of the products thereof, and other combustible or explosive material, etc.”

We find that this power has been upheld in the case of *Standard Oil Company v. City of Danville*, 199 Ill. 50.

In that case the City Council had passed an ordinance making it unlawful for any person, firm or corporation to keep or store any petroleum, naphtha, benzine, gasoline, coal oil, or any of the products of petroleum, or any inflammable or explosive oils, within the space of one thousand feet of any dwelling house, store room, building, barn, shed or other like structure, within the corporate limits of said city, in a quantity greater than five barrels, of fifty gallons each, at one time.

Under the provisions of this ordinance, the City of Danville had obtained judgment for \$25.00 against the Standard Oil Company which had maintained for many years an establishment for the storage of its products in a part of the city far removed from any human habitation. However, in the course of time the immediate neighborhood of the plant had been built up and the property owners complained against the further maintenance of the same.

This led to the passage of the ordinance in question. The company claimed that the ordinance was unreasonable and unfair in that it tended to confiscate its property by driving it outside the city limits.

Citing the powers of the City Council the court answered the company's contention, by saying:

‘The health, safety and comfort of the people are the controlling considerations, and prescriptive rights to endanger either, cannot be acquired. As the limits of the inhabitable parts of cities extend, establishments that endanger the health, safety or comfort or the population or

such extended portion of the city, and become nuisances, may be required to be removed to other localities. (Citing, *Laflin & Rand Powder Company v. Tearney*, 131 Ill. 322.)”

Our regulations of the subject are contained in sections 691 to 694½ of the Chicago Code of 1911.

Sections 691 and 692 were amended August 14, 1912 (C. J. pp. 1712-3), section 693 (par. b and c) was amended December 18, 1911 (C. J. p. 2079) and (April 14, 1913 p. 4425).

We find these sections so intricate and extensive in dealing with the subject, as to require a complete redraft thereof in case your honorable body should decide to pass an ordinance as contemplated in the order.

As a matter of fact such ordinance would completely revolutionize present regulations and render property, such as buildings and tanks used for the storage of tar, oil, etc., absolutely valueless for the purpose. In addition, the time after which the provisions of such a drastic measure are to become effective, deserves the most serious consideration.

At present we can only advise that your honorable body is clothed with full power to pass an ordinance of the character adopted by the City of Danville.

However, to prepare a new ordinance covering the range of existing ordinances, we should be granted such additional time as the importance of the subject warrants.

Respectfully submitted,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 5, 1914.

EDWARD N. SHERBURNE, Esq.,
10 South La Salle Street,
Chicago, Illinois.

Dear Sir:

Your letter addressed to the mayor in which you ask to be advised as to the exact date when the City of Chicago as-

sumed jurisdiction over the territory formerly known as Morgan Park, was referred to this department for reply.

Jurisdiction was assumed by the City of Chicago on April 22, 1914. The statute controlling annexation provides that the officers who are charged by law with the duty of canvassing the votes shall file a certificate of the result of the vote with the clerk of the County Court immediately upon ascertaining same. And if it shall appear that the majority was in favor of annexation, the jurisdiction of the city shall extend over such territory.

The vote in the City of Chicago was taken on April 7, 1914, and in the Village of Morgan Park, it was taken on April 21, 1914. The certificate of the result of the election was filed on April 22, 1914. The annexation was effective immediately upon the filing of this certificate.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 6, 1914.

HON. EUGENE BLOCK, Chairman of the Committee on Local Transportation.

Dear Sir:

In compliance with the request of a sub-committee of your committee for an opinion as to the authority of the city council to require a street railway company to change the location of its tracks in a street, we beg to advise you that the city is possessed of such power whenever the public welfare, safety or convenience requires that such change be made.

In the recent case of *City v. The New York, Chicago and St. Louis Railroad Company*, in the United States Circuit Court of Appeals for the Seventh Circuit, No. 2036, the court dealt with this subject, and in so doing said:

“The other element in the 1909 ordinance is the exercise of police power. Though a railroad company may insist upon holding its perfected right of way latitudin-

ally and longitudinally, a city in the interest of the public, if authorized by the state so to act, may enforce a shifting or an elevation of the tracks within the limits of the right of way upon or across a street. *C. B. & Q. R. Co. v. Chicago*, 166 U. S. 226; *C. I. & W. R. Co. v. Connersville*, 218 U. S. 336; *Grand Trunk W. R. Co. v. South Bend*, 227 U. S. 544. Undoubtedly the principal object of the 1909 ordinance was to command and control track elevation in the interest of public travel on 79th street. That legislation was under a power which would not be foreclosed by a contract to that effect, even if the City had not expressly reserved the power in the 1909 ordinance. But nevertheless the part of the ordinance that constitutes a grant of property rights must be upheld as fully as if the grant were in an ordinance by itself."

The conclusion of the court in the case cited is fully supported by the authority cited by the court in that portion of its opinion from which we have quoted. Other cases supporting the conclusion of the court in that regard are:

Baltimore v. Baltimore, 166 U. S. 673.

Wabash Railroad v. Defiance, 167 U. S. 88.

Yours truly,

CHAS. M. HAFT,

Assistant Corporation Counsel.

Approved:

Wm. H. SEXTON,

Corporation Counsel.

JUNE 8, 1914.

HON. GEORGE B. YOUNG, M. D., Commissioner of Health.

Dear Sir:

You referred to this department a question with reference to the propriety of the City Comptroller disapproving a contract that was authorized by order of the City Council.

You state that the City Council on March 2, 1914 (C. J. 4133), authorized the Commissioner of Health to advertise, receive bids and enter into a contract with the lowest responsible bidder for furnishing fruits and vegetables for a period of three months beginning April 1, 1914, and that, pursuant to said order, you advertised, received proposals, and awarded

the contract. You also state that the City Comptroller returned the contract which you prepared unapproved.

From the copy of the letter of the comptroller relating thereto, it seems that the reason for such disapproval is that he questions the expediency of making such a contract because he believed supplies of that nature cannot be prudently bought at any time for a three months' period unless your department has a man better informed as to the product "in sight" than the contractor. He also says that the prices named are high, and that the estimate of the amount of such goods required for the period is only \$450 and that for this reason the purchases "should be made by the Business Agent on open market, as needed, or by a market buyer of the department."

The first reason given by the city comptroller stands on an entirely different footing from the other two. It involves the question of whether the comptroller has the right to disapprove a contract on the ground that he doubts the wisdom of the City Council in authorizing you to make such a contract. In this respect we believe he is wrong, and if that were his only objection he would have exceeded his authority. But with regard to the other two reasons, it would seem that he has the right to withhold his approval.

Section 24 of the Chicago Code of 1911 gives the City Comptroller supervision over the contracts of the city, and charges him with the duty of exercising supervision, in subordination to the mayor and city council, over all such interests of the city as may concern the city finances, revenues and property. Section 50 of the Code requires that all contracts before becoming of any effect shall be approved and countersigned by the comptroller. Section 44 places upon him the duty of examining into the correctness of all vouchers, authorizes him to make examinations and inspections, and generally gives him the right to inquire into anything concerning the city's interests relating to a purchase, whether on written contract or otherwise. While this latter provision relates particularly to the checking up of all items furnished, in order to determine that everything is in conformity with the contract, nevertheless, it is important to note same in connection with his general supervisory power. Under Section 2516 he

is given a sort of general control, through the making of rules and regulations, over the Business Agent.

The above ordinances, and others that might be cited, undoubtedly place into the hands of the comptroller the authority to withhold his approval of any contract which he deems unfavorable to the city by reason of price, insufficiency of surety or other mistake or irregularity which may have escaped the head of the department who entered into same. His approval of contracts is not to be regarded as merely a perfunctory matter, but he is supposed to guard the interests of the city in all its business relations with contractors.

Consequently, even if the head of the department entering into a contract has observed all the requirements of the ordinance, still if the comptroller thinks that the contract in some way fails to protect the city's interests, or if he thinks that the city is paying too high a price, or if he thinks the city's financial interests otherwise would suffer thereby, he is justified in withholding his approval, with the one exception noted above.

Again, inasmuch as the Code (Section 2517) requires that all purchases of supplies and materials where same amount to less than \$500 shall be made by the Business Agent, he has the right to refuse his approval of a contract made by the head of a department for a smaller amount, even though the city council has authorized such a contract by an order duly passed. This authority arises from the fact that an order cannot supersede or render inoperative an ordinance which is in full force. We do not wish, however, to be understood as saying that where the estimated amount was over \$500 and the lowest bid happened to be less than such sum, that he is justified in saying that the purchase must be made through the business agent, since we believe a reasonable construction of the \$500 limitation would make it apply to the estimated amount of a contract for supplies and materials rather than to the actual amount which is purchased. It is quite possible that an estimate may greatly exceed the sum of \$500 and some change may occur that will make it unnecessary to purchase so much. In that event the contract of the head of the department is entirely proper, even though the ordi-

nance uses the word "shall" with regard to the purchase of such goods by the business agent.

The one exception to the authority of the city comptroller, as stated above, is where he undertakes to override the will of the city council on a question of expediency. If the city council directs that a contract shall be entered into in a certain way he is bound by its action just as all other city officers are.

In the present instance, if the objection of the comptroller were based solely on the propriety of entering into a contract for a period of three months, even if he believes that such a contract is not wise owing to fluctuations in price which nobody can foresee, we believe that his refusal to approve the contract would be contrary to the spirit and intent of the ordinance. But, based as it is on two other reasons as well, it would seem that he has not acted beyond his authority.

The suggestion made by the comptroller to the effect that the purchases might be made by a market buyer of the department cannot be followed out without express authority from the city council. There is no provision in the ordinances for such a course. On the contrary, the very fact that an exception to the general rule for the making of purchases is made in Section 2517, whereby the Commissioner of Health is given the power to purchase medicinal, preventive and curative supplies and make certain other contracts in case of an emergency, must be taken as a limitation on the power of such commissioner in regard to purchasers of supplies of another character.

While we are not able to cite any adjudicated cases on the precise questions you ask, we have given what we regard as a reasonable interpretation of the ordinances relating to the subject.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 9, 1914.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

On April 27th, 1914, (Council Journal, page 39), your Honorable body directed the corporation counsel to submit an opinion as to the power of the City of Chicago to install and maintain municipally owned ice plants, to operate same and to sell the products of such operation to the people of Chicago. This order further directs the corporation counsel to advise your honorable body as to what specific state legislation is required to give such right to the city in the event it has not now such power.

The first question submitted was answered by us on April 7th, 1913, in an opinion rendered to your committee on judiciary and was to the effect that the City of Chicago had no authority to purchase, establish and maintain municipal ice plants and could only do so upon obtaining such authority from the legislature. Without reviewing in detail the authorities upon which that opinion was based, we will now briefly restate the reason for the conclusion reached therein.

The City of Chicago has been given no express power to manufacture or sell ice, and inasmuch as the city is limited to the exercise of such powers as are expressly granted or are necessarily incidental thereto, it cannot establish and maintain ice plants nor sell ice to its inhabitants. The foregoing conclusion relates to the establishment by the city of municipal ice plants solely for the purpose of selling ice to its inhabitants.

Whether the city can construct an ice plant or equip a municipal building with ice making machinery for the purpose of supplying ice to be used by the municipality, is a question which we deem pertinent to a discussion of the matter presented by you.

If, perchance, in the exercise of an express power to establish and maintain municipal buildings in connection with the operation of which ice is used, the city should find it practicable to install ice making machinery therein or to erect an ice plant to provide ice for use therein, it could do so. For

example, the city in constructing a hospital, which it has express power to do, could equip the same with ice making machinery or could erect an ice plant in connection therewith for the purpose of supplying the ice needed in the operation of the same.

But if the city could only install ice making machinery or an ice plant of such capacity as could supply no more ice than might be required by the city at the time of the installation of same, this phase of the question would not be material. However, municipal corporations as well as private corporations can anticipate their future needs and provide for the same. So, when the city installs an ice plant or ice making machinery for the purpose of manufacturing the ice required for its use, it can at such time make reasonable provision for its future needs and, having done this, can dispose of any surplus not needed by it.

Dillon on Mun. Corps. 5th Ed. Sec. 997, pp. 1594, 1596, says:

“In erecting or acquiring public buildings for corporate purposes a municipality is *not restricted to its present necessities*, but may anticipate and make provision for its *reasonable future necessities*. Although the building may be held for public use, the municipality may allow the entire building, or a part thereof, to be used incidentally for *private purposes for compensation*, and may make leases of surplus space for the purpose of deriving an income therefrom, provided, always, such private use or such leases do not interfere with the application of the building to the legitimate public needs of the municipality. But although the *municipality may make reasonable provisions for future* WANTS in erecting a public building and may lease the surplus space resulting therefrom, it will not be permitted under cover of so doing to erect a building not in fact for public needs as they may arise, but for the *express purpose of devoting the building to private purposes*, wholly or in part.”

From the above it will be seen that the primary purpose of the installation of ice making machinery or an ice plant, must be to supply the needs of the municipality itself.

We are of the opinion that the city can install ice making machinery or an ice plant of a capacity sufficient to provide

for its future needs for the purpose of manufacturing ice for its own use and that it may sell any surplus to its inhabitants.

Your second question as to what specific state legislation is required to enable the city to install and maintain ice plants and sell manufactured ice to its inhabitants, involves a consideration of the power of the state to authorize cities to do this, the question being whether public funds may be expended for such a purpose.

Several states, including Connecticut, Minnesota, Wisconsin and Georgia, have enacted legislation authorizing cities therein to construct and maintain municipal ice plants, but so far as we are informed the only case dealing specifically with this subject is that of *Holton v. Camilla*, 134 Ga. 560, 31 L. R. A. (N. S.) p. 116, in which case the court, in upholding the validity of the power, says at pages 124 and 125:

“If a city has the right to furnish heat to its inhabitants, because conducive to their health, comfort, and convenience, we see no reason why they should not be permitted to furnish ice. The object in bringing, by means of a waterworks system, water in pipes from a distance, for use in supplying the needs of a city, is not alone to obtain a sufficient quantity, but also to secure that which is freer from impurities than it is possible to obtain in the city itself. If, in the hot season of the year, the inhabitants of the city must, for sanitary reasons, relinquish the cool draught from the well, because, as has been demonstrated, wells of pure water cannot be maintained in populous communities, surely the city would have the right, were it practicable to cool the water which it delivers through pipes as a substitute, and which oftentimes is scarcely drinkable in its heated condition. If not practicable to cool it in the pipes, and if it be necessary to the welfare, comfort, and convenience of the inhabitants that its temperature be lowered before being used for drinking purposes, why cannot the city provide for the delivery of a part of it in a frozen condition, to be used in cooling such part of the balance as is used for drinking purposes? Is the difference between water in a liquid and in a frozen condition a radical one? Upon what principle could the doctrine rest that liquid water may be delivered by the city to its inhabitants by flowage through pipes, but that water in frozen blocks cannot be delivered by wagon or otherwise? If the city has the right to furnish its inhabitants with water in a liquid

form, we fail to see any reason why it cannot furnish it to them in a frozen condition. The answer of the defendant, which was introduced in evidence and considered upon the trial, states that in the hot climate in which the city of Camilla is situated, ice is necessary for the comfort, health, and convenience of its inhabitants. If this is true, why should not the city be permitted to furnish ice to its inhabitants? And if the furnishing of ice to its inhabitants is conductive generally to their health, comfort, and convenience, it is certainly being furnished for a municipal or public purpose. It is a well-known fact that one of the main uses to which ice is put is the cooling of water for drinking purposes, and when it is used for this purpose, if impure, it is as apt to be deleterious to the consumer as any other impure water. Why then, in the exercise of its police power, may not a city guard against impurities in the ice as well as the water used by its inhabitants.

Nor do we see any rational objection on the idea that the city will be engaging in a manufacturing enterprise. The city might perhaps equally as well be said to be manufacturing when, by the use of filtering process, it changes impure water into that which is pure. When, in connection with its waterworks system, it produces ice, it merely, by certain processes, changes the form and temperature of a part of the water supplied by that system. We do not think the operation by the City of Camilla of an ice plant in connection with its waterworks system, for the purpose of furnishing ice to its inhabitants, is in violation of the sections of the Constitution referred to in the plaintiff's petition, or that it is illegal for any reason."

We are informed that the Supreme Court of Louisiana has just rendered a decision in the case of *Union Ice Company v. Town of Ruston*, which involved the power of the Town of Ruston to establish an ice plant in connection with its water and light plant, but we are not advised as to how this case was decided.

We are of the opinion that the legislature may authorize the City of Chicago to manufacture and sell ice to its inhabitants for the reasons stated by the court in the Holton case, *supra*. This power may be given to the city by an amendment

to the Cities and Villages Act, or by a separate act. We will gladly prepare a draft of such a bill if it be desired.

Respectfully submitted,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 10, 1914.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

You forwarded to this department a communication from the Chicago Bureau of Public Efficiency addressed to the City Council relating to the receipt of moneys from the County Treasurer, and you state that your committee requests us to look into the matter and submit suggestions on same.

The gist of this communication relates to the statement of the County Treasurer that he pays the city its funds collected by him according to a pre-arranged schedule, and that if there is delay in the turning over of the money to the city the responsibility rests with the city authorities for failing to make the proper request for what is due.

In the letter referred to, the Bureau calls attention to the fact that the payments which the County Treasurer, as *ex-officio* Town Collector and *ex-officio* County Collector, made to the city from time to time, during the years 1911, 1912 and 1913 have borne practically no relation to the amounts collected at the time such payments were made. It is pointed out that in the year 1911 \$5,475,032.67 was placed to the credit of the city on March 18th as having been collected prior to March 11th, but that the whole of this amount was not received by the city until April 28th; likewise, that of the sum of \$18,725,515.58 credited to the city between March 10th and December 15th, of which it is stated at least \$16,500,000 was probably received before June 1st, only \$4,268,877.06 was paid to the city by that date, and that thereafter payments of one million and one and a quarter million were made from time to time until December. It is also stated that similar con-

ditions existed in 1912 and 1913 and that no material change has been made in the schedule arranged for 1914.

It is true that the moneys are paid over in accordance with a schedule prepared at the beginning of the year. This practice was inaugurated during the last administration when Mr. Walter H. Wilson was City Comptroller. It arose as the result of conditions which made it essential that the Comptroller should know with certainty when he could expect a fixed amount of money in order to do away with frequent misunderstandings leading to situations that were sometimes injurious to the city's credit.

Prior to that time the County Treasurer would make payments only when he saw fit, and it frequently happened that on account of the rush of business in his office and for other reasons he found it impracticable to draw up a statement and to remit with same. Serious delays would thus occur at times when it was most embarrassing for the City Comptroller to await the convenience of the County Treasurer. Large amounts were sometimes borrowed from the banks on tax anticipation warrants with the understanding that fixed sums would be paid at a certain time, and when the time arrived the Comptroller would experience difficulty in meeting such agreements.

In view of this situation, the Comptroller came to an understanding with the County Treasurer that certain fixed amounts should be paid at times named in a pre-arranged schedule, the balance to be accounted for by the County Treasurer when he was in a position to go through his books and make an accounting. Although this arrangement did not tend always to bring in the money of the city as fast as it should have been received, it was found to be a great improvement over the old method of making frequent demands which were not met, thereby leaving the matter entirely to the discretion and convenience of the County Treasurer.

The present comptroller continued the practice of preparing and agreeing upon a schedule, although he did not lose sight of the fact that the moneys were due when collected, and he notified the County Treasurer at the start and twice

each month that he wanted payments of all funds belonging to the city in the latter's possession.

The schedule arranged for the current year contemplates the payment of a much larger amount by the first of June than heretofore, the sums thus fixed aggregating \$12,500,000 before June 1st. Afterwards it fixes \$3,000,000 for each of the months of June, July and August, \$2,500,000 for each of the months of September and October, and \$3,377,183.52 for the month of November. While not representing even approximately the amounts estimated as within reach at the dates of payment, this schedule bears some relation to the coming in of taxes and comes much nearer bringing in the revenues of the city at the time they are collected than before.

There is a duplication and inconsistency in the various statutes relating to the city's revenues which is responsible for much of the lack of system and lack of uniformity in the paying over of taxes to the proper authorities when collected. Whether or not these laws can be reconciled so that it may be said that there is an absolute rule of conduct which must be followed by the County Treasurer and which is at the same time practicable in so large a community as this, is a question that we have gone into only to the extent indicated herein. In all probability if the County Treasurer were to take issue with the city authorities in regard to this, it could not be settled finally without a judicial interpretation of the law.

It may be said further that the inconsistency above referred to is due in some measure to the fact that the County Treasurer is by law made *ex officio* town collector of all the towns within the city and *ex officio* county collector thereby making it necessary to look to various provisions of the statute defining the duties of these officers which were not intended originally to meet such a situation.

In Article VIII of the Cities and Villages Act the method of levying and collecting the general taxes of cities and villages is prescribed. It says that the tax assessed in conformity with the requirements named therein shall be collected by the same officers as collect state and county taxes, and then provides for payment to the city or village treasurer in the following manner:

“§3. It shall be the duty of the officer collecting such tax to settle with and pay over to such treasurer, as often as once in two weeks from the time he shall commence the collection thereof, all such taxes as he shall then have collected, till the whole tax collected shall be paid over.”

In Section 138 of the Revenue Act the town collector is required to pay over taxes collected by him to the city treasurer “as often and at such times as may be demanded by the proper officer.”

So far there is no real inconsistency, since the only limitation mentioned in the above section of the Cities and Villages Act is that payments should be made as often as once in two weeks, but they may be made oftener on the demand provided for in Section 138 of the Revenue Act. Both of these acts were passed in 1872.

We find next, however, that by an amendment to the Revenue Act passed in 1873, the law provides that the town collector, or in this instance the County Treasurer as *ex officio* town collector, shall “every thirty days, when required so to do by the proper authorities,” render a statement and pay over the amount shown to be collected. (Revenue Act, Sec. 164.) Sections 167 and 169 of the same act (the latter section was amended in 1881) also require him, within twenty days after March 10th, to make final settlement either with the city authorities or to turn over the balance to the county collector. Since he is also *ex officio* county collector, this provision, in the absence of demand for such settlement, simply means that in his capacity as town collector he is to account to himself as county collector within twenty days after March 10th for taxes received by him as town collector.

The provisions last mentioned are clearly inconsistent with the others referred to and quoted above. But we assume that they will control, since in the one feature in which they essentially differ the later act will be followed. In other words, since Section 164 of the Revenue Act was passed in 1873, we would say that in case demand is made by the proper city officers for a settlement every thirty days after the first of January up to March 10th and for a final settlement within twenty days after March 10th for all moneys collected by the

County Treasurer as *ex officio* town collector such demand would have to be complied with.

As *ex officio* county collector the County Treasurer proceeds with the collection of taxes and special assessments after March 10th, and he is required by law on or before April 10th to make a sworn statement showing the total amounts received by him from town or district collectors (including the sums turned over by himself as *ex officio* town collector) and the total amount of each kind of tax collected by himself as county collector. Such statement should be filed in the office of the county clerk, and on or before April 15th payment should be made to the city treasurer of the amount shown by such statement to be due the city.

Under the law, taxes and special assessments not paid on March 10th are regarded as delinquent, although no interest accrues on same until after May 1st. The section governing the payment to the city of delinquent taxes and special assessments collected by the County Treasurer as *ex officio* county collector, is as follows:

“§244. The county collector shall report and pay over the amount of tax and special assessments, due to towns, districts, cities, villages, corporations and persons, collected by him on delinquent property, at least once in every ten days, when demanded by the proper authorities or persons.”

It will be observed that the last section quoted is also at variance with the provisions of the Cities and Villages Act and in a measure conflicts with the other provisions of the Revenue Act referred to above. But as to the conflict with the latter act, it can be reconciled on the theory that, since it was passed as part of the original act of 1872, it is so far modified by the section requiring a final settlement on April 15th that it must be construed as applying only after that date.

Consequently, we would interpret the law to be that after he assumes the duties of county collector the County Treasurer could be required to make a full statement on April 10th and to turn over the money on April 15th, and thereafter to pay over moneys collected on either taxes or special assessments every ten days on proper demand.

Section 178 of the Revenue Act, relating to special assessments, provides that "county collectors shall collect, account for, and pay over the same to the authorities or persons having authority to receive the same, in like manner as they are required to collect, account for and pay over taxes." Section 70 of the Local Improvements Act of 1897 requires collectors to pay over the moneys collected on special assessments "at such time or times and in such manner as shall be prescribed by ordinance."

Thus it will be seen that there is even some conflict with regard to moneys collected on special assessments, although unquestionably the Local Improvement Act should be followed in this instance as being the later enactment. Acting on this theory undoubtedly the City Council enacted Sections 82, 83 and 84 of the Chicago Code of 1911, which require payments to be made on the first and fifteenth of each month by the County Treasurer as *ex officio* county collector. We have no doubt that this provision can be enforced.

From the above it must be plain to you that there will be confusion until such time as the law is absolutely fixed either by a new statute or by judicial interpretation. It is possible that action on the part of the City Council may to some extent remedy the difficulties heretofore encountered if it takes the matter in hand and prescribes by ordinance when demands shall be made on the County Treasurer and, so far as possible, fixes the duty of the County Treasurer. The only provisions in the ordinances with reference to the demand for such moneys at the present time are the ones relating to special assessments above referred to.

With a view to arriving at some understanding on this subject, the writer took up the question with the County Treasurer. The latter expressed himself as desirous of co-operating with the city authorities for the purpose of devising some regular plan or method which would bring the moneys of the city collected by him into the hands of the city treasurer as quickly as possible, and which would be practicable for all concerned and would not unduly hamper him in the work of his office.

There is usually a rush to pay taxes immediately before and

on the first of each month beginning with the first of May of each year, induced by the fact that penalties are thereby avoided, and whatever method is determined upon should take this into consideration, both from the standpoint of benefit to the city on account of the larger amount which it is entitled to immediately thereafter, and from the stand point of the County Treasurer whose office force is crowded with work at those times.

The County Treasurer also states that it is practically impossible to render a complete statement that he can verify under oath as frequently as the law seems to contemplate; that it virtually means closing up his books for about five days in order to do so, since it takes time to make the entries in the books, there are corrections and rebates to be made and there are matters held in abeyance such as uncertified checks and other items which are not finally credited until they have cleared. But he stated that he was entirely willing to make an approximate estimate, as often as the City Council should determine, of all taxes and special assessments received by him belonging to the city from time to time as required, and to forward the amount thus approximately arrived at to the City Treasurer without delay.

We do not see how it would be of great benefit to frame an ordinance which would permit payments or approximate amounts or estimated amounts, since that would leave the question of how much to turn over wide open. But, in order to give the County Treasurer a chance to act in conformity with the spirit and intent of the law and still not render him liable in case his accounts are not balanced as frequently as the law contemplates, it would probably answer the purpose if the ordinance requires him to turn over all the collections belonging to the city in his possession but does not require a sworn statement except at longer intervals.

We therefore recommend that an ordinance should be drawn up and submitted to the City Council authorizing and directing the City Comptroller to make demand on the County Treasurer as *ex officio* town collector on the first day of February of each year for all moneys due the City of Chicago collected by him up to that time, and to make demand on the

fifteenth of March of each year for a final accounting by sworn statement and for payment of the moneys due the city in accordance with the statute; also authorizing and directing the City Comptroller to make demand on the County Treasurer as *ex officio* county collector on the fifth and twentieth days of each and every month for all moneys due the city collected by him up to that time, and to make demand for an accounting by sworn statement and the payment of all moneys due the city from him on the fifteenth day of the months of February, May, August and November of each year, such sworn statement and payments to be made within ten days after each demand.

It may be said that you would be leaving open the amount of the bi-monthly payments if you did not require a sworn statement each time, and that the question of how much has been collected would depend on the estimate of the County Treasurer, and that perhaps too wide a latitude is given the latter since he may not always be inclined to exercise good faith in the matter. But we are convinced that such a method as is outlined would result in payments that would more nearly approximate from time to time the actual income of the city in point of time as collected than the method pursued heretofore.

In any event, if the County Treasurer should not respond in good faith, action could then be taken which would compel him to account in accordance with law, even if it required litigation to fully interpret the law. Whatever the result of such litigation would be there would undoubtedly be more sworn statements required than as outlined above, and the prospect of so largely increasing the work of his office would probably operate as a check on him and persuade him, even if inclined to do otherwise, that it was advisable for him to exercise good faith in making his estimates.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 12, 1914.

HON. MONTAGUE FERRY, Commissioner of Public Service.

Dear Sir:

We are in receipt of your communication of the 5th inst., requesting certain information in respect to the matters hereinafter referred to.

1. The ordinance revising and codifying the general ordinances of the City of Chicago known as "The Revised Municipal Code of Chicago of 1905," was passed by the city council March 20, 1905 and went into force April 25, 1905. Section 938 of said code requiring an illuminating power of gas of not less than 20 candle power went into force on April 25, 1905.

On January 21, 1907, the city council passed an ordinance (Council Journal of January 21, 1907, p. 2768), amending Section 938 of the Revised Municipal Code of Chicago of 1905 so that said section should read as follows:

"938. ILLUMINATING POWER.) Any person or corporation engaged in, carrying on or conducting the business of furnishing or supplying illuminating gas in the city to any consumer or consumers shall be and hereby is required to furnish and supply gas to an illuminating power of not less than twenty-two candle power. The gas while being tested shall be burned by means of a No. .07 Bray Slit-Union low pressure burner when used in connection with the photometer and accessories hereinbefore specified.

"The unit and standard of light shall be that volume of light which is produced in a horizontal direction by one standard English candle burning at the rate of one hundred and twenty grains of sperm per hour."

2. The ordinance revising and codifying the general ordinances of the City of Chicago, known as "The Chicago Code of 1911," was passed by the city council March 13, 1911 and went into force on April 22, 1911. Section 1033 of said code in respect to the illuminating power of gas went into force on April 22, 1911.

Said Section 1033 was amended by an ordinance passed by the city council July 17, 1911. Said Section 1033, as amended, provides, among other things, that any person or corporation carrying on or conducting the business of fur-

nishing or supplying illuminating gas in the city to any consumer or consumers shall afford an illuminating power of not less than twenty-two candle power.

3. No general ordinance prescribing a candle power standard for gas was in force during the period of 1893-1897. The maximum price of gas and the candle power during said period were fixed by a written agreement entered into by and between the City and The Peoples Gas Light and Coke Company and six other gas companies, dated June 17, 1891, which provided that the price of gas furnished for illuminating purposes to private consumers should not exceed the net prices stated in said agreement for the several years covered thereby for 1000 cubic feet of gas of 24 candle power. Said agreement appears on page 505 *et seq.* of the Council Journal of July 16, 1891. Said agreement of June 17, 1891 terminated December 31, 1897.

In connection with your inquiry the following data may be of service:

On October 15, 1900, the city council passed a general ordinance fixing the maximum net price for gas at 75 cents per 1000 cubic feet and also providing that "Manufactured gas so furnished shall afford a light of not less than twenty (20) candle-power, to be measured and ascertained at the place of consumption in said city by the most modern appliances known to science for measuring the candle-power of illuminating gas," (Council Journal of October 15, 1900, p. 1181).

Shortly after the passage of said ordinance, The Peoples Gas Light and Coke Company filed a bill in the United States Circuit Court for the Northern District of Illinois seeking to enjoin the enforcement of said ordinance. The Circuit Court refused to grant the injunction and dismissed the bill of complaint. The gas company prosecuted an appeal to the Supreme Court of the United States, which court, on April 4, 1904, affirmed the decree of the Circuit Court.

Before the order of affirmance was entered in the United States Supreme Court, a bill was filed in the United States Circuit Court for the Northern District of Illinois by one, Mills, a non-resident stockholder of The Peoples Gas Light and Coke Company, against the City of Chicago and the gas

company, to restrain the City from enforcing said ordinance of October 15, 1900.

The bill charged, among other things, that the said ordinance was invalid because the city council had no power from the State to regulate gas rates. The Circuit Court held that under the then existing statutes of the State of Illinois the City did not have the power to fix rates for gas, and a decree was accordingly entered enjoining the City from enforcing said ordinance of October 15, 1900. (*Mills v. City of Chicago*, 127 Fed. 731; *Mills v. City of Chicago*, 143 Fed. 430.)

At the 1905 session of the General Assembly of Illinois, an act was passed entitled "An Act to confer on the City of Chicago the power and authority to sell surplus electricity and to fix the rates and charges for the supply of gas and electricity for power, heating and lighting furnished by any individual, company or corporation to said City of Chicago and the inhabitants thereof." Said act was approved May 18, 1905, and in force July 1, 1905.

It will be observed that Section 938 of The Revised Municipal Code of Chicago of 1905 was passed before the gas rate act of May 18, 1905, was approved or in force.

On February 14, 1906, which was after the above mentioned gas rate act went into force, the city council passed an ordinance, (Council Journal of February 14, 1906, p. 2639,) fixing the maximum net price for gas at 85c per 1000 cubic feet for the next five years from and after the taking effect of said ordinance, and providing as follows in regard to candle power:

"The illuminating gas so furnished shall afford a light of not less than twenty-two candle power, to be measured and ascertained at the places of consumption in said city by the most modern appliances known to science for measuring the candle power of illuminating gas."

Said ordinance of February 14, 1906, was accepted by The Peoples Gas Light and Coke Company and the Ogden Gas Company and the Universal Gas Company and expired February 24, 1911.

On July 17, 1911, the city council passed an ordinance amending Article III of Chapter XXXII of The Chicago

Code of 1911 by striking out Section 1040 thereof, which said Section 1040 was in substance a re-enactment of Section 1 of the aforesaid ordinance of February 14, 1906, regulating the maximum prices of gas for the next five years from and after February 24, 1906, and substituting for said Section 1040 a new section, to be designated as Section 1040, which fixed the maximum price for gas for the next five years after said ordinance of January 17, 1911, went into effect, as follows: During the first year of said five-year period, 75c; second and third years, 70c, and during the last two years of said five-year period, 68c, for each 1000 cubic feet of gas, with an additional price of 5c for each 1000 cubic feet of gas if the consumer failed to pay therefor within ten days after the delivery or presentation to him of his bill.

Said ordinance of July 17, 1911, also amended Section 1042 of The Chicago Code of 1911 in regard to the penalty for charging in excess of the maximum rates specified in the new Section 1040.

The pending litigation between The Peoples Gas Light and Coke Company and the City of Chicago, with which you are doubtless familiar, is in respect to the enforcement of said ordinance of July 17, 1911.

Yours truly,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 12, 1914.

HON. JAMES GLEASON, General Superintendent of Police.

Dear Sir:

Your communication of the 8th instant, with attached correspondence, is at hand. In accordance with your request we have changed the draft of the proposed ordinance licensing sample carriers, making the license fee required therein Five dollars (\$5.00) instead of Twenty-five dollars (\$25.00).

You further request that the ordinance make provision for the taking of a general description and a photograph of the licensee. Doubting the authority of the city to compel the

taking of a photograph of such licensee, merely for the purpose of having the same for identification in the event such licensee should violate a criminal law, which would appear to be the only purpose of such a provision, we suggest that the ordinance require each licensee thereunder to at all times have on his person a license card containing a general description and a photograph of such licensee. A copy of such license card, of course, could be retained by the city.

Such a provision could be upheld on the theory that the license card is necessary to enable the police to determine whether or not a person engaging in the business of a sample carrier was in fact the person to whom a license was issued. We have, therefore, added a section to the ordinance incorporating the provision just suggested, and have further provided that no license can be transferred or assigned.

Respectfully submitted,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 12, 1914.

H. W. ALGER, Esq., Manager Sporting Goods Department
Hibbard, Spencer, Bartlett & Company, Chicago, Illinois.

Dear Sir:

Your communication of the 9th instant, requesting information relative to the application of the ordinance regulating the sale of firearms and other dangerous weapons, is at hand. In reply we will answer the questions in the order presented in your communication.

Under Section 7 of said ordinance you are not permitted to continue in your sales room the open display of revolvers. However, this section does not prohibit the display of revolvers to respective purchasers of the same for the purpose of enabling them to make their selection.

As to your supplying revolvers to wholesalers not engaged in the firearms business, who may desire to purchase the same from you for the purpose of supplying customers

outside of the city, we are of the opinion that if such revolvers are in fact delivered by such wholesalers without the city there is no objection.

As to delivery by you of revolvers to your country customers, who select the same in your store and desire to take them at that time, we are of the opinion that this cannot be done under the ordinance.

One of the purposes of the ordinance is to, so far as possible, give the police department information concerning those people who obtain deadly weapons, and were your country customers permitted to procure weapons in the City of Chicago without a permit no such information would be in the possession of the police department.

Yours very truly,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 15, 1914.

HON. OTTO KERNER, Alderman Twelfth Ward.

Dear Sir:

We have your communication of the 29th ult. in reference to the above entitled matter, which communication is annexed hereto and returned herewith.

In this communication you ask us to advise you whether an ordinance, which you attach to your letter, being the existing smoke ordinance amended in certain particulars would be valid if enacted.

It is well settled that, where the surroundings are such that the emission of dense smoke from an opening of any kind is in fact a nuisance, the council may declare it to be a nuisance and may prohibit it under penalty.

Harmon v. City of Chicago, 110 Ill. 400.

Marshall Field & Co. v. City of Chicago, 44 Ill. App. 410.

Milligan v. Nelson, 51 Ill. App. 441.

It may safely be affirmed also, under the authority of

these cases, that the emission of dense smoke from any kind of an opening in the closely built-up portions of the City of Chicago would be a nuisance and could be validly declared to be such by the council and prohibited. There may be some doubt as to whether the words "within the city" may not be too broad, and as to whether it might not be held that there are open spaces within the city limits in which the emission of such smoke might not be a nuisance in fact, but this objection applies as much to the existing ordinance as to the amendments.

We see no reason why the proposed amendments should invalidate the ordinance. There may be serious question as to whether dense smoke could come from such receptacles as are specified in the amendment. It might come from an open bin, if such a bin were filled with a certain kind of coal and if such coal were to take fire. But the other receptacles specified in the amendment are receptacles of liquids and not of solids. While these might emit dense steam, it is not very easy to see how they could emit dense smoke. However, this criticism does not go to the question of validity. If, as a matter of fact, dense smoke were emitted from such receptacles, there is no reason why this should not be prohibited.

We advise you, therefore, that there is nothing in the proposed amendments which would invalidate the ordinance.

Yours respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

JUNE 15, 1914.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In compliance with your request for an opinion concerning certain questions, we beg to advise you as follows:

The questions as they arise are controlled by the terms of the ordinance of February 11, 1907.

We will take up each of the questions in turn and advise you relative thereto.

I.

DOES THE ORDINANCE OF 1907 AUTHORIZE THE USE OF OPERATING RECEIPTS FOR THE PAYMENT OF CAPITAL EXPENDITURES?

The capital expenditures that are to be made are such and such only as are covered by Section 7 of the ordinance in question. That section provides what shall be done, and then continues, "and the cost and expense thereof shall be borne and paid by the company." If the ordinance had only used the word paid, there might be some basis, though slight, for the contention that the mere act of disbursement on the part of the company was contemplated thereby, and that the fund out of which the payment was to be made was that formed by an accumulation of receipts derived from operation. It seems to us, however, that any such contention is rendered irrational and futile by the employment of the word borne in conjunction with the word paid. The Century Dictionary defines bear, from which of course borne is derived, as follows:

"To endure the effects of; take the consequence of; be answerable for.

"To sustain, as expense; supply the means of paying."

This latter meaning is, undoubtedly, that which the drafters of the ordinance had in mind when they used the word "borne" in connection with the word "paid".

The idea of capital expenditures being paid out of receipts derived from operation is further negatived by succeeding language in Section 7, which is in part as follows: "and to the actual amount paid (and borne), by the company in and about carrying out each and all of the requirements of this section shall be added ten per cent of such amount as a fair and proper allowance, to the company for conducting the said work and furnishing said equipment *and five per cent for its services in procuring funds therefor, including brokerage, etc.*"

This language clearly indicates that it was in contemplation of the parties that the company would not have funds in its possession or under its control out of which capital expenditures could be lawfully "borne and paid" by it. Nevertheless, the ordinance does contemplate that the company

would have in its possession receipts from operation. For example, Section 28 of the ordinance provides:

“The Company shall make daily deposits with some depositary or depositaries authorized by this ordinance of *all* money received by the Company from the operation of the street railways and property, and shall make appropriate provision for the payment of reasonable interest on the money so deposited by such depositary or depositaries, which interest shall be added to and be held and considered as a part of the gross receipts of the said street railway system and property.”

It is, therefore, plainly to be seen that although the idea, of receipts from operating, was well in mind, it was, nevertheless, regarded as necessary for the company to “procure” funds out of which capital expenditures should be “borne and paid” by it, and it was further contemplated that it would have to pay brokerage, in order to procure additional capital funds out of which it might meet the expenditures so to be paid and borne by it. The company surely would not be required to pay a brokerage fee to any one, if, under the terms of the ordinance, it was licensed to dip into the partnership money chest at pleasure. The force of these provisions then is that receipts from operation should not be used for capital expenditures. If such receipts were to be used to defray capital expenditures, it would be wholly unnecessary for the company to procure that which it already had. Furthermore, it hardly seems probable that the Mayor and Council should agree that there should be paid to the company a brokerage fee or commission of five per cent. for violating the provisions of Section 28 which required it to place and keep on deposit all money received from the operation of the railways in order that interest might be obtained thereon.

Section 28 requires the company to make daily deposits of all money received from operation and to make provision for the payment of interest on the money so deposited. How is interest to be obtained from the depositary on all money when part of that all is not with the depositary but has been withdrawn from the depositary by the company, with which to meet capital expenditures?

Much light seems to be thrown on the question now under

consideration by the report of the Board of Supervising Engineers for the year 1908. That report at pages 36 and 37 quotes verbatim the language of Section 7 interjecting parenthetically at certain points, words elucidating the true meaning of the section, as to the source from which all capital funds are to come. There is a note which is made a part of the report explaining how the parenthetical words come to be employed.

The report referred to is, in part, as follows:

"The company shall purchase materials and equipment, and employ engineers, superintendents, clerks, foremen and workmen and shall pay all expenses of every nature, including legal expenses necessary to the proper, complete and prompt performance of the above mentioned work, upon the lowest advantageous terms, and subject to the approval of the said Board of Supervising Engineers, and to the actual amount paid by the company in and about carrying out each and all of the requirements of this section, shall be added ten per cent of such amount as a fair and proper allowance to the Company (out of additional capital funds)" provided by it, for conducting the said work and furnishing said equipment and five per cent for its services in procuring funds therefor, including brokerage.

"The said Board of Supervising Engineers shall on or before the 15th day of each month make a report in writing, dated the first day of such month, to the City Comptroller of the amount of money actually expended during the previous month by the company (out of such additional capital funds,)* with the approval of said Board of Supervising Engineers, in and about carrying out the requirements of this section, together with the percentages of such amount in the next preceding paragraph provided for, and all amounts contributed by the company to the cost of said subway or extensions thereof, together with five per cent of the amounts so contributed; and the interest provided in Section 24 hereof, as a reduction from gross receipts, shall begin to run upon the total amount of each such certificate from and after the date thereof.

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"*The words in parenthesis are not in the ordinance, but were agreed to by the City's Special Traction Counsel, this Board and the companies, as interpreting the meaning within this section."

We therefore advise you that the language of the ordinance in question, in effect, provides that operating receipts shall not be used for the payment of capital expenditures.

II.

DOES THE ORDINANCE OF 1907 AUTHORIZE PERMITTING THE COMPANY TO USE OPERATING RECEIPTS, BY PAYING TO THE JOINT ACCOUNT TWO PER CENT INTEREST UPON THE FUNDS SO WITHDRAWN BY THE COMPANY?

This question seems to be controlled by Section 28 which provides that interest shall be paid by the depositary or depositaries. Under the familiar rule of construction, that the expression of one thing is to the exclusion of all others it follows that when provision is made for the payment of interest by depositaries that payment of interest by the company was under no circumstances to be considered. The Mayor and Council has abundant reason in precluding the idea of the company being permitted to withdraw money placed with the depositaries upon the payment thereon of interest at two per cent.

The rate of interest obtainable from a depositary is measured to a very material extent by the largeness of the fund deposited and the degree of permanency of the deposit. That is to say, the smaller the fund and the shorter the time that it is to remain on deposit, the smaller will be the rate of interest that the fund will draw. Naturally, therefore, the city would not consent that the duration of the deposit be rendered uncertain by allowing the company to withdraw therefrom at pleasure when the ordinance clearly contemplates that all deposits together with interest thereon shall be held at least to the end of the fiscal year (January 31st).

Section 25 provides for an accounting as of January 31st, and a division of net receipts on or before April 10th, evidently meaning that operating receipts should remain intact until the time of division. If the company were to be permitted to hold or use receipts from operation and pay interest thereon, it would thereby become the depositary of such funds. But the ordinance clearly contemplates that the company shall not be a depositary.

Section 26 of the ordinance provides who may be a depositary and the enumeration therein contained is exclusive. Section 26 provides that any State or National Bank in Chicago or New York having a capital and surplus of \$1,000,000 or more, may be a depositary and the language there employed means that only such State or National Banks may be depositaries. Section 27 makes the company the guarantor of the depositary. If, therefore, the company were to become both the depositary and the guarantor thereof, the city would thereby be deprived of the liability of any bank for the security and payment of the net receipts at the end of the fiscal year.

As the ordinance reads, both the banks in which the operating receipts are deposited daily and the company are responsible therefor, but if the company should be permitted to constitute itself a depositary, there would be no guarantor of its responsibility for funds so deposited.

We are, therefore, forced to conclude that when the company uses operating receipts with which to pay capital expenditures it is not only acting without the authority of the ordinance, but is also acting contrary to the plain meaning thereof.

III.

DOES THE ORDINANCE OF 1907 AUTHORIZE; WITHDRAWAL OF THE COMPANY FROM THE JOINT ACCOUNT OF INTEREST UPON THE CAPITAL ACCOUNT CALCULATED MONTHLY?

The right of the company to interest on capital account arises out of the language of Section 25 which, so far as the subject now under consideration is concerned, provides:

“On or before the 10th day of April in each year the company shall come to an accounting and settlement with said city as of the 31st day of January last preceding upon the following basis:

“From the gross receipts of said street railway system and property from all sources of every kind for the year ending on said 31st day of January, there shall be deducted for such year; * * *

“Second: A sum equivalent to five (5%) per centum per annum for said preceding year upon the amount of the cash purchase price which the city would

then be obligated to pay on account of the items in subdivisions 1, 2 and 3 of section 20 hereof, if it were purchasing the property for municipal operation on such 31st day of January, interest being adjusted as to items added to such purchase price during said year," etc.

It will be noted that the deduction to be made is "for such year," not for a part of a year or for a number of parts. The ordinance evidently contemplates a single deduction as distinguished from twelve deductions and it also contemplates that such deduction shall be made between January 31st and April 10th.

That but a single deduction for interest is to be made, is further evidenced by the provision that a sum equivalent to five (5%) per cent shall be deducted, as distinguished from a number of sums aggregating five (5%) per cent as would be the case if monthly deductions were to be made. The idea of monthly deductions for interest being made is further refuted by the well established rule of law that if interest is payable at a certain rate per annum the payment thereof is to be made not more than once a year and not twelve times a year.

Walker v. Kimball, 22 Ill. 537.

Kurz v. Suppiger, 18 Ill. App. 630.

Dulaney v. Payne, 101 Ill. 325.

Illinois National Bank v. Trustee, 111 Ill. App. 189.

But it is quite apparent that inasmuch as the ordinance calls for an annual settlement, that the deduction is to be made at the time of settlement, in other words, annually.

We must therefore advise you that the company may not, under the terms of the ordinance, withdraw from the joint account, interest upon its capital account, calculated monthly.

III (a).

DOES THE ORDINANCE OF 1907 AUTHORIZE: THE ADDITION TO CAPITAL ACCOUNT OF AMOUNTS EXPENDED BY THE COMPANY IN PAYMENT OF (a) SPECIAL ASSESSMENTS?

Section 25 expressly provides that special assessments shall be deducted from gross receipts and unless such items are to be paid twice they cannot be paid out of capital ac-

count and also out of gross receipts. There cannot be found in the ordinance the slightest basis for the contention that special assessments are to be paid out of additions to capital as distinguished from gross receipts.

III (b).

DOES THE ORDINANCE OF 1907 AUTHORIZE: THE ADDITION TO CAPITAL ACCOUNT OF AMOUNTS EXPENDED BY THE COMPANY IN PAYMENT OF, (b) SALARIES OF OFFICERS AND ATTORNEYS?

Section 19 provides that the company may pay to the directors, officers, agents and attorneys of the company *as a part of the operating expenses*, compensation for their services commensurate with the service actually rendered by them respectively, etc.

It is thus seen that salaries of officers and attorneys are by the express terms of the ordinance classified as operating expenses so that the ultimate question for determination is, out of what fund are operating expenses to be paid. This inquiry leads us again to Section 25 which provides that, "From the gross receipts of the said street railway system and property from all sources of every kind for the year ending on said 31st day of January, there shall be deducted for such year:

First: (1) All expenses of operation, including maintenance, repairs and renewals."

Clearly, therefore, by the terms of the ordinance, salaries of officers and attorneys must be paid out of gross receipts and not out of additions to capital account. It must be born in mind, however, that by reason of the provisions of Section 7, any "legal expenses necessary to the proper, complete and prompt performance of" the work of extensions, etc., may be charged to capital account, if extra legal services are engaged for that purpose, but not otherwise.

III (c).

DOES THE ORDINANCE OF 1907 AUTHORIZE: THE ADDITION TO CAPITAL ACCOUNT OF AMOUNTS EXPENDED BY THE COMPANY IN THE PAYMENT OF, (c) SALARIES AND EXPENSES OF THE BOARD OF SUPERVISING ENGINEERS?

Section 36 provides in part:

“The said Board of Supervising Engineers shall maintain an office in the said city and shall employ the necessary assistance and purchase the necessary supplies and materials to enable it to properly perform its duties under this ordinance. * * *”

The salaries and expenses of said Board of Supervising Engineers during the period of “Immediate Rehabilitation” provided for in this ordinance shall be added to and form a part of the cost of such “‘Immediate Rehabilitation,’ but thereafter shall be paid out of gross receipts.” But inasmuch as the period of “Immediate Rehabilitation” has concededly passed, everything that may be properly said to be within the term “salaries and expenses of said Board of Supervising Engineers” should by the expressed provisions of the ordinance be charged to operating expenses and be paid out of gross receipts, and are not therefore chargeable to capital account.

III (d)

DOES THE ORDINANCE OF 1907 AUTHORIZE: THE ADDITION TO CAPITAL ACCOUNT OF AMOUNTS EXPENDED BY THE COMPANY IN THE PAYMENT OF, (d) PROMOTION EXPENSES OF RAILWAY EXTENSIONS NOT AUTHORIZED BY THE CITY?

Inasmuch as the ordinance undertakes to provide what expenses may be incurred by the company, as between it and the city and in turn provides how such authorized expenses shall be paid, and to what account charged, and inasmuch as in the enumeration of such expense no mention is made of promotion expenses, the irresistible conclusion is that as between the company and the city no such expenses are to be incurred. The ordinance (Section 7) does provide, however, that when an actual extension is made the expense thereof may be charged to capital account. But the line should be sharply drawn between anticipation and realization.

After careful study of all of the provisions of the ordinance of February 11, 1907, we are unable to discover any provision therein contained that warrants the payment, out of additions to capital account, of a proportion of overhead and general expenses of the company.

Of course, if additional help, or extra time of a regular

employe is necessitated by reason of extension work, a reasonable compensation therefor is properly chargeable to capital account, but not otherwise.

IV.

DOES THE ORDINANCE AUTHORIZE: THE COMPANY TO CHARGE TO CAPITAL ACCOUNT TEN PER CENT, AS A CLEAR PROFIT UPON ITS EXPENDITURES, INCLUDING A PORTION OF ITS GENERAL EXPENSES IN ADDITION TO THE ACTUAL EXPENDITURES MADE BY IT IN EXTENSIONS?

The subject of allowing to the company ten per cent upon expenditures made by it is regulated by Section 7 of the ordinance which provides that all construction, reconstruction, equipment, re-equipment, extensions and additions to plant, etc., shall be done and performed by the company; that it shall purchase material etc., and employ engineers, superintendents, clerks, foremen and workmen and shall pay all expenses of every nature, including legal expenses, necessary to the proper and complete performance of the work and then follows: "and to the actual amount paid by the company in and about carrying out each and all of the requirements of this section, shall be added ten per cent of such amount as a fair and proper allowance to the company for conducting the said work and furnishing the equipment."

Of course, in conducting work of the nature of that involved in Section 7, certain overhead expenses must necessarily be incurred and a portion of the time of certain of the company's officers will be required and it is the evident purpose of this ten per cent provision that it shall compensate the company for these and other similar things.

It follows that inasmuch as an allowance of this item of ten per cent is in lieu of any overhead or general charge that there are no general expenses upon which the ten per cent is to be calculated. The ten per cent is itself the general expense and the only general expense that the ordinance permits, so far as charges to capital account or allowing ten per cent on capital account charge is concerned.

V.

DOES THE ORDINANCE AUTHORIZE: THE COMPANY TO CHARGE TO CAPITAL ACCOUNT THE ENTIRE COST OF ITS NEW EQUIPMENT WITHOUT ANY DEDUCTIONS FROM SUCH ENTIRE COST FOR REPLACEMENTS?

So long as new equipment is to be used in addition to equipment in use at the time that the ordinance became operative, we are of the opinion that by reason of the provisions of Section 7, it is properly chargeable to capital account, without any deductions. But, if, for instance, the company buys one or more cars to take the place of an equal number of cars which for some reason the company is no longer using, the entire cost thereof should be charged to the renewal fund, unless the cost exceeds the T. V. C. value of the car replaced in which case the amount of the T. V. C. should be charged to renewals and the balance charged to capital account, and the amount derived from a disposition of the car replaced, should be credited to the renewal fund.

This is the construction placed on the ordinance by Mr. Arnold during his testimony before arbitrators in the wage controversy hearing (page 2720) and we see no reason to differ with him in that regard.

VI.

DOES THE ORDINANCE AUTHORIZE: PAYING OUT OF RENEWAL ACCOUNTS ANY OF THE GENERAL EXPENSES OF THE COMPANY OR THE BOARD OF SUPERVISING ENGINEERS, OR THE COST OF POWER PURCHASED BY THE COMPANY?

Section 16, which pertains to the subject of renewals, provides, in part, as follows:

“No payments shall be made by said company out of said funds except on the written certificate of the Board of Supervising Engineers for renewals which are hereby defined to be the replacement of any principal part of said street railways or of their equipment or appurtenances.”

Another portion of Section 16 provides that:

“On or before the 5th day of each and every month of each and every year that the company continues to

operate said street railway system after the expiration of said three (3) year period of 'Immediate Rehabilitation' the company shall deposit with one or more of the said depositaries in a special fund appropriately designated a sum equal to eight (8%) per cent. of the gross receipts of said railways and property for the preceding month, which will constitute a reserve fund for taking care of renewals and depreciation of said street railways and property; and out of said fund the Board of Supervising Engineers shall from time to time authorize the payment by the company of such amounts as are necessary to pay for the renewals of said street railways and property; the portion of said fund remaining unexpended to continue in said fund as a provision for the depreciation of said street railways and property, and shall be disposed of as hereinafter provided."

In Mr. Fisher's analysis of the ordinance in question, which is found in the report of the Board of Supervising Engineers, 1908, at pages 32 and 33, we find the following:

"* * * If the companies are to be protected in their legitimate capital investment, *they must certainly be required to protect that investment in the interest of the city, so that at all times the properties shall be kept up to their highest efficiency by adequate expenditures for maintenance, repairs and renewals, and that there shall be an adequate reserve fund to cover depreciation.*"

The Special Traction Counsel for the city in the proceedings of the Local Transportation Committee of the City Council of Chicago, December 13, 1906, defines the purpose of the renewal and depreciation fund as follows:

"There is a question in Section 16, which has been suggested, which the engineers now have under consideration, as to whether there should be a separate percentage for depreciation or whether depreciation should be included in the total provisions for maintenance, renewals and repairs. The amount which is to be set aside is to be such an amount that it will not only take care of the ordinary renewals and repairs, but that depreciation which goes on which it is necessary to provide for in order that we may have this either the exact equivalent of what we agree upon as the present value of this property or the money to make it good. That amount is to be arrived at according to the experiences of street railways in the past. It is expressly provided in the ordinance that should that amount be too low, if that fund should not be

adequate, this company is under specific obligations to do whatever is necessary in addition thereto to keep it always up to par."

It is thus seen that we have in the ordinance itself a specific definition of the term "renewals." That definition is supplemented by the interpretation of the Special Traction Counsel of the purpose of the renewal provisions of the ordinance.

In view of the circumstances, we are impelled to conclude that the ordinance does not authorize paying out of the renewal fund general expenses of either the company or the Board of Supervising Engineers, nor does the ordinance authorize the payment out of said fund of the costs of power purchased by said company or any portion thereof.

Respectfully submitted,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
Acting Corporation Counsel.

JUNE 15, 1914.

HON. JOHN R. TRAEGER, City Comptroller.

Dear Sir:

As stated to you by the writer, we have gone into the question of the proper method to pursue in regard to the payment of the liability of the various surety companies concerned in making good the demands of the city growing out of the closing of the La Salle Street Trust and Savings Bank.

We deem it advisable that the payments of the various surety companies should be made to the city comptroller as the fiscal agent of the city. We also believe that it is advisable in all cases where the surety company tenders payment for the full amount under which it is liable on the bond, that such payment should be accepted and the settlement should not be held up on account of formalities which the party tendering the money may insist upon. There is no way in which the city in case of immediate payment can receive any more than the full amount of the penalty named in the bond, and inasmuch as this must be tendered in each case, we see

no reason whatever for declining to accept same and executing such receipts or assignments for same as may be necessary in order to assure the surety company that the city has released it of all further liability thereunder.

We have prepared a form of receipt, which we send herewith, that in our opinion is ample and that will protect such surety companies and enable them to enforce their claims against the La Salle Street Trust and Savings Bank. If an assignment is insisted upon or if it is insisted that the bond should be cancelled and surrendered at the time payment is made, the writer will be at your service so that you can consult with him. There is certainly no objection to endorsing on the bond that payment of all liability has been made, and in case all parties meet their obligations without delay, the bonds themselves can be surrendered with safety.

Pending the final settlement of the entire affair, we have no doubt the bond companies will be satisfied to accept the receipt in the form that we have submitted, since, as a matter of law, the principal on the bond at once becomes liable to the surety upon the making of the payment undertaken by the surety.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
BRYAN Y. CRAIG,
Acting Corporation Counsel.

JUNE 15, 1914.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

Your letter of March 27, 1914, advising us that the assets of the Adams Generating Company have been transferred to the Commonwealth Edison Company and requesting an opinion as to whether under such transfer the Commonwealth Edison Company should pay 3 per cent. or 10 per cent. compensation, has been handed the undersigned for reply.

We have been informed by Mr. Colin C. H. Fyfe, former president of the Adams Generating Company that all the

assets of the Adams Generating Company were on December 14, 1913, transferred to the Commonwealth Edison Company. Mr. Fyfe also advises us that the Adams Generating Company has been operating under two franchises, one the Dexter franchise referred to in your letter and the other the Adams Generating Company franchise given January 9, 1911, page 3411, C. J. The Dexter franchise has, as we have already informed you, long since expired and has never been renewed.

The Adams franchise authorizes the Adams Generating Company to furnish steam power only; provides for a 3 per cent. compensation; and gives no right to furnish electricity. The Commonwealth Edison Company state that they are not using the Dexter franchise and have never used the same; that the only rights they obtained from the Adams Generating Company is the right to furnish steam power to their customers, which they do not do, not being in that business, nor have they a right to furnish steam under their state charter. The Commonwealth Edison Company contends that under its general franchise it has the privilege of furnishing electricity to all its various customers in the block bounded by State, Adams, Dearborn and Quincy streets, and that while the Adams Generating Company transferred or sold its assets to the Commonwealth Edison Company, the latter company has received no franchise rights, which it did not possess before the sale.

The franchise given to the Commonwealth Electric Company on June 28, 1897 (which franchise was subsequently acquired by the Commonwealth Edison Company), page 476 C. J. of said date gives the right to the Commonwealth Electric Company

* * * "to construct, maintain and operate a plant or plants, and in connection therewith to construct, repair, maintain, operate and use in, through, upon, over and under the streets, avenues, alleys, sidewalks, public ways, tunnels and upon viaducts and under the Chicago River and its various branches within the City of Chicago, a line or lines of wire or other electrical conductors to be used for the production, transmission and distribution of electricity for the purpose of furnishing light,

heat and power, and the transmission of sound and signals, or any or either of them.'"

The Commonwealth Edison Company as successor, to Commonwealth Electric Company, under its franchise is obligated to pay to the City of Chicago 3 per cent. of its gross receipts.

In our opinion the Commonwealth Edison Company does not require the Dexter nor the Adams Generating Company ordinance in order to furnish electricity to its customers in said block bounded by State, Adams, Dearborn and Quincy streets, even though it may have purchased or annexed the plant of the Adams Generating Company for that purpose.

The company after such annexation furnishes electricity from its general plant and under its general franchise, and is only required to pay 3 per cent. compensation.

Yours truly,

LOUIS SALINGER,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
Corporation Counsel.

JUNE 17, 1914.

HON. EUGENE BLOCK, Chairman Committee on Local Transportation.

Dear Sir:

On June 11, 1914, you requested this department to furnish the committee on local transportation with an opinion as to the validity of an ordinance providing for the exclusion, during street railway rush hours, of all traffic other than street railway traffic from that portion of the street occupied by street railway tracks in streets upon which such tracks are laid.

There is no doubt that the city, under the Seventh, Ninth, Tenth, Twentieth and Sixty-sixth clauses of Section 1 of Article V of the Cities and Villages Act, has ample power and authority to control the use of the streets and to pass all reasonable regulations concerning the use of such streets for all classes of vehicles.

See:

Elliot on Roads and Streets, Secs. 1109 and 1112, and cases cited.

28 Cyc. 907.

Christy v. Elliot, 216 Ill. 31.

Hartje v. Moxley, 235 Ill. 164.

Dillon on Municipal Corporations, Sec. 1166.

Cicero Lumber Co. v. Cicero, 176 Ill. 9.

Fifth Av. Coach Co. v. New York, 194 N. Y. 19.

Harrison v. Elgin, 53 Ill. App. 452.

People v. James, 16 Hun (N. Y.) 426.

McQuillan on Municipal Corporations, Sec. 933.

McQuillan on Municipal Ord., Secs. 458-464.

City of Chicago v. Collins, 175 Ill. 456.

The courts have held that by virtue of the supervision and control of streets vested by statute in a municipality, a municipality has the power to entirely prohibit certain classes of vehicles from public highways unless certain ordinance requirements are complied with.

McQuillan on Municipal Corporations, Sec. 936.

For instance, ordinances have been sustained prohibiting vehicles carrying heavy loads from using the public streets of a city unless the vehicles were equipped with tires not less than a certain number of inches in width.

Harrison v. Elgin, *supra*.

People v. James, *supra*.

In *State v. Phillips*, 78 Atl. 283, the court held that the exercise of the State's police power to limit and control the use of highways (as by excluding automobiles from some of them), is not a violation of the fourteenth amendment of the United States Constitution. In this case the court sustained an act of the legislature actually prohibiting the use of automobiles on the highways of four towns on the Island of Mt. Desert, Maine.

See also to same effect:

State v. Mayo, 106 Me. 62.

An ordinance regulating traffic in public streets, however, in order to be enforceable must be reasonable. Its enforcement should not operate as a hardship or be oppressive; and,

if the ordinance operates upon a class, there must be some reasonable basis for the discriminating classification.

State v. Swagerty, 203 Mo. 517.

Elliot on Roads and Streets, Sec. 1111.

State v. Mayo, *supra*.

City of Chicago v. Banker, *supra*.

Christy v. Elliot, *supra*.

State v. Phillips, *supra*.

Some question might be raised that an ordinance such as contemplated by your committee is class legislation, in that it discriminates between street cars, carrying passengers, and other kinds of vehicles, such as buses and sightseeing autos, which likewise carry passengers. We believe, however, that there is a reasonable basis for the discrimination. Street railways are confined in their operation to tracks especially constructed for such street railways. This cannot be said of buses and sightseeing autos, which do not require tracks for operation. Buses and sightseeing autos are not as much at the mercy of other slower moving vehicles and break-downs in general street traffic, where such break-downs occur upon the right of way of street railways.

The regulation contemplated is in the interest of hundreds of thousands of passengers during periods of the day when street railway congestion is greatest. A regulation which tends to promote the comfort, convenience and even health of such passengers by providing better transportation facilities is easily sustained under the city's charter powers.

We are of the opinion that the city has the power to pass an ordinance providing for the exclusion, within reasonable boundaries, during street railway rush hours of all traffic other than street railway traffic from the right of way of street railways. Such an ordinance would be valid and could be sustained.

Yours very truly,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 17, 1914.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

We have your communication of the 1st inst. relative to the matter referred to in the heading, enclosing letter of May 21, 1914, of the Chicago Postal Pneumatic Tube Company to the department of public works, setting forth its position in the premises and requesting the corporation counsel to advise you "whether or not we can compel the company (Chicago Postal Pneumatic Tube) to comply with the recent ordinance."

The ordinance of March 18, 1913, (Council Journal, pages 4140-4141,) provides that it shall not be lawful for any one to install, etc., "any pipe, conduit, cable or other construction in any water pipe tunnel owned by the City of Chicago," except upon the terms and for the compensation therein specified.

The grant in the ordinance to the Chicago Postal Pneumatic Tube Company of July 13, 1903, (Council Journal, page 794 *et seq.*) gave "permission and authority to construct, lay, place, maintain and operate pneumatic tubes, not to exceed two tubes for each route from place to place * * * with all suitable switches, turnouts and connections with such electrical or other connections as are absolutely necessary for the operation of said switches, turnouts and connections in, through, upon and under the streets, avenues, alleys, public ways, tunnels, bridges, viaducts and under the Chicago River and its various branches within the City of Chicago, * * *" for which the company was required to pay 3 per cent. per annum of the gross revenues and receipts of said company for the first four years of the life of its ordinance and 5 per cent. per annum of the gross revenue and receipts for the remaining sixteen years of the life of its ordinance.

We are therefore of the opinion that the ordinance of recent date does not apply to the Chicago Postal Pneumatic Tube Company as to such tubes (two in number) as it is granted the right to construct and operate by its ordinance, *supra*.

We return herewith letter of the Chicago Postal Pneumatic Tube Company.

Yours very truly,

GEO. B. O'REILLY,

Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,

Acting Corporation Counsel.

JUNE 17, 1914.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

In answer to your request of the 4th inst., relative to water main extending from 95th street and Cottage Grove avenue, parallel to the right of way of the Illinois Central Railroad to 115th street, I have made further investigation and find that on July 14, 1881, an ordinance for the laying of a water main from 95th street to 111th street, was passed by the President and Trustees of the Village of Hyde Park. Another ordinance was passed August 26, 1881, to extend said main from 111th to 115th street, on the west side of the right of way of the railroad company.

These ordinances led to special assessment proceedings in the County Court. The mains were laid and the owners through whose property they were laid paid the assessments levied by virtue of these proceedings. Among these owners was the Pullman Company.

The records of the Village of Hyde Park on file in the City Clerk's office give the whole history in each case, but the files in the County Court in case 115 are missing.

From what I have found I am satisfied that the Village Trustees passed the two ordinances at the request of the property owners and that no formal easement was exacted by the Village. At least no evidence of any easement can be found.

On the other hand I do not believe that the city can claim any prescriptive right in the land, for the reason that the right to lay and maintain the pipes was not adverse, but with the consent of the owners.

I am equally satisfied that the present owners cannot now

demand the removal of these mains, and while they may be justified in claiming damages for the use of the land it would be necessary for them to prove that their property is in reality damaged by the pipes.

A case similar to this one recently was decided in favor of the City of Chicago by the United States Court of Appeals. In that case the city had constructed a water tunnel 70 feet below the surface of the lots owned by John Jamper, without the owner's knowledge or consent and without proceedings to assess compensation. This was trespass, and yet Kemper's prayer for an injunction to remove the tunnel, was denied by the court and he was relegated to his remedy at law for damages.

In this case the element of trespass is absent and for that reason I am of the opinion that the city should stand upon its rights under the ordinances first cited. Even if they grant merely a license to use the land, the court proceedings and the assessments levied and paid under them, are sufficient notice to the present owners of the land that the pipes were laid with the knowledge of the then owners and without objection on their part.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 18, 1914.

HON. GEORGE F. HARDING, Chairman Committee on Compensation.

Dear Sir:

Pursuant to your request of the 17th inst., with reference to the proposed vacation of Stone street between Banks and Goethe streets, I hereby answer your questions seriatim, as follows:

1. The city is only liable in damages to property owners whose means of access to and egress from their property is impaired or destroyed by the act of vacation. In this case no

damages can be claimed by owners whose property is situated in any of the blocks south of Goethe street as shown on the enclosed plat, for the reason that neither their access nor their egress is impaired. Mere inconvenience which they may suffer, does not entitle any of them to damages.

Ill. Malleable Iron Co. v. Lincoln Park Comrs., 263 Ill. 451, and cases cited.

2. The City Council may determine whether or not there will be any liability for damages by reason of the act of vacation. In this case your committee has fixed the sum at \$103,000.

You may also exact a bond to cover any and all damages that may accrue by the passage of the ordinance.

3. The City Council is empowered to vacate streets or parts thereof whenever in its opinion they are no longer required for public use.

Chapter 145, Rev. Stat.

All papers are herewith returned.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 20, 1914.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

On May 26, 1914, you transmitted to this department, by writing, a request for advice as to the duties of the city council and the city clerk in the matter of publishing notices of the primary and election for the Municipal Court justices to be elected in November, 1914, ten of whom are to be elected for the full term and one to fill the vacancy caused by the death of Judge David Sullivan.

There is nothing in the Municipal Court Act relating to the subject-matter in question. If any notice is required, it must be found in some of the laws regulating the manner of holding elections. We must say that, in so far as these laws

relate to the question of notices of election, they are quite confusing and it is difficult to determine with any degree of certainty what the requirements are.

Section 12 (see Hurd's Rev. Stat. of 1913, p. 1143) of the law providing for primary elections, is as follows:

"§12. At least twenty (20) days before each primary the county clerk of each county, or the city, village or town or other clerk, whose duty it is to give notice of general elections under the general election laws of the State, for the election of officers whose nomination is required to be made under the provisions of this Act, shall prepare in the manner provided in the general elections laws of this State, a notice of such primary, which notice shall state the time and place of holding the primary, the hours during which the polls will be open, the offices for which candidates will be nominated at such primary and the political parties entitled to participate therein. Such notices shall be posted at least fifteen (15) days prior to the primary by the same authorities and in the same manner as notices of election under the general election laws are required to be posted."

It will be seen from the foregoing that notice of the primary election for Municipal Court judges must be given by that clerk whose duty it is under the general election laws of this State to give notice of the general election as distinguished from the primary election for the office of Municipal Court judge; and that notice must be posted at least fifteen days prior to the primary by the same authorities and in the same manner as notices of election under the general election laws are required to be posted. In other words we must turn to the provisions of the general election laws of this State governing Municipal Court judges, if any there are, to determine by whom the notice in question must be given and the manner in which such notice should be posted for the primary election as well as for the general election to be held in November, 1914.

The only provision in the general election laws of this State relating to notices is found in Section 46 of an act entitled, "An Act in regard to elections and to provide for filling vacancies in elective offices," approved April 3, 1872, in force July 1, 1872. (See Hurd's Rev. Stat. of 1913, p. 1045.)

Said Section 46 is as follows:

“§46. At least thirty days previous to any general election, and at least twenty days previous to any special election, except in cases otherwise provided for, the county clerk, in counties not under township organization, shall make out and deliver to the sheriff of his county, or in counties under township organization to the several supervisors of his county, three notices thereof for each precinct or district in which the election in such county is to be held. The notice may be substantially as follows:

Notice is hereby given, that on (give the date), at (give the place of holding the election and the name of the precinct or district), in the county of (name of county), an election will be held for (give the title of the several offices to be filled), which election will be opened at eight o'clock in the morning and continued open until seven o'clock in the afternoon of that day.

Dated at this day of, in the year of our Lord one thousand eight hundred and

A. B., County Clerk.”

(See Hurd's Rev. Stat. of 1913, p. 1053.)

It has, however, been held that the general election law does not control city elections (*Welsh v. Shumway*, 232 Ill. 54, 66); and it is our opinion that an election for justices of the Municipal Court of Chicago is a city election because:

(a) The Municipal Court of Chicago is a city court. (*Miller v. People*, 230 Ill. 65, 74; *Hosking v. Southern Pacific Co.*, 243 Ill. 320; 324; *People v. Olson*, 245 Ill. 288, 294.)

(b) Judges of city courts are municipal officers. (*Wolfe v. Hope*, 210 Ill. 50, 61.)

Article IV of the Cities and Villages Act relates to the subject of elections for city officers. Section 9 of that article is as follows:

“§9. The city council shall designate the place or places in which the election shall be held, and appoint the judges and clerks thereof, and cause notice to be printed in some newspaper published in such city, if there be one, or posted at each voting place in such city, of the time, places of election, and of the officers to be elected, for at least twenty days prior to such election.”

(See Hurd's Rev. Stat. of 1913, p. 269.)

In *People v. Healy*, 231 Ill. 629, it was held that the gen-

eral provision of the Cities and Villages Act relating to the power of the mayor to remove officers appointed by him has reference to appointments made under said act and does not extend to officers appointed under other distinct acts. Reasoning by analogy, it may be said that the general provision of the Cities and Villages Act relating to notices of election applies to elections for offices created by or under the authority of that act and does not extend to officers created under the Municipal Court Act. It is doubtful, therefore, whether the provisions in the Cities and Villages Act relating to elections apply to the justices of the Municipal Court of Chicago.

Moreover, the Cities and Villages Act was passed by the legislature in 1872. In 1885 the legislature passed an act entitled, "An Act regulating the holding of elections and declaring the result thereof in cities, villages and incorporated towns in this State." (See Hurd's Rev. Stat. of 1913, p. 1074.)

Section 7, Article II of the act last referred to, as subsequently amended and now in force, provides that the board of election commissioners shall divide the city into election precincts.

Section 15 of Article II of the same act provides that the board of commissioners shall designate the polling places in each precinct in the city and give public notice thereof.

Section 19 of Article II of the same act is as follows:

"§19. It shall be the duty of such board to give timely notice through the press of the time and place of registration and election in each precinct of such city, village or incorporated town; and they shall also cause the printed list and supplement of the registration for the previous election to be posted up at the place of registration, two days before such registration, with a printed notice of the time and place of the next registration. This to be obligatory only after the first registration under this act."

(See Hurd's Rev. Stat. of 1913, p. 1083.)

It does not seem reasonable to assume that the legislature intended that two notices should be given for each city election, one a twenty days' notice by the city authorities as is provided in the Cities and Villages Act, and the other a

“timely” notice by the board of election commissioners as is provided by the city election law.

Apparently it was the purpose of the legislature in passing the city election law to substitute the board of election commissioners for the city authorities in conducting city elections and to substitute the provisions of the city election law for those in the Cities and Villages Act relating to the manner of holding elections.

If that object was not accomplished in every particular, it was only because of omissions in the city election law. In so far as any particular subject-matter is expressly covered by the city election law, we believe it was intended by the legislature that the provision relating to that subject-matter in the city election law should supersede the provisions of the Cities and Villages Act. This must be especially true of those provisions which are inconsistent with the Cities and Villages Act. (*King v. Jordan*, 198 Ill. 457, 460.)

Now it so happens that the city election law does not expressly provide that the notice therein provided for shall designate the officers to be elected, and in that respect it may be said that the notice required to be published by the board of election commissioners is insufficient as a substitute for the notice required under the Cities and Villages Act.

It has been held that where the time and place of election are fixed by law, an omission to give the proper notice of election will not vitiate an election held on the day appointed by the law. (*Stephen v. People*, 89 Ill. 337.)

The Municipal Court Act expressly designates the number of justices to be elected and the time when such election shall be held, and also the contingencies under which an election may be held to fill vacancies. It would seem to follow, therefore, that the provisions in the Municipal Court Act referred to are sufficient notice of the officers to be elected in November. And the same may be said of the primary law, which fixes the time for the holding of the primary election to nominate candidates for offices to be filled in November.

We note, however, that the provision in the primary law relating to notice of the primary election contains a requirement for posting the notice therein referred to at least fifteen

days prior to the primary. No such provision is made in the city election law. And in the Cities and Villages Act, the requirements for publication of notice and posting are in the alterantive, *i. e.*, notice is required to be posted only in the event that there is no newspaper in the city in which it may be published. While the primary law requires the posting of notice of the primary by the same authorities and in the same manner as notice of election under the general election laws is required to be posted, the posting of such notice at least fifteen days prior to the primary by some authority seems to us to be mandatory.

The only method of reconciling the provision with reference to notice in the primary law with the provisions relating to the same subject-matter in the general election laws governing city officers is for the city council to cause a notice of the primary election to be posted at each voting place in the city at least fifteen days prior to the primary election.

While we are of the opinion that if the city council or the city clerk should fail to do anything in regard to the notice of the primary and election in question, it would not vitiate such election, we believe that the proper thing to do in view of the discrepancies in the election laws and the uncertainty of the requirements relating to notices of election, that the board of election commissioners should give timely notice through the press of the primary election and general election in question, as required by Section 19 of Article II of the city election law; and also that the city council should pass an order directing the city clerk to prepare a notice of the primary election at least twenty days before such primary, which notice shall state the time and place of holding the primary, the hours during which the polls will be open, the offices of associate justices of the Municipal Court for which the candidates will be nominated at such primary and the political parties entitled to participate therein, and also directing said city clerk to post such notice at least fifteen days prior to the primary at each voting place in the city. The city council should also pass an order directing the city clerk to cause notice to be printed in some newspaper published in the city of the time, place of election and officers of the Municipal Court

to be elected for at least twenty days prior to the election in November.

Respectfully submitted,

JOS. GROSSMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 22, 1914.

HON. WILLIAM J. HEALY, Chairman Committee on Streets
and Alleys.

Dear Sir:

In compliance with the request of your committee I herewith present to you a short history of Holmes' Subdivision and my reason for advising that the ordinance vacating the streets shown on the plat recorded in 1874 should be approved, upon condition that the present owner of all that part of said subdivision lying east of the center line of Michigan avenue as shown on the plat, shall dedicate the streets and alleys shown on the plat marked Exhibit "B".

From the facts before me December 14, 1911, I held that the plat of Holmes' Subdivision was a common law plat and that two certain instruments recorded in 1879 and 1887 respectively, purporting to vacate the same in two distinct parts, were ineffective in law.

I arrived at this conclusion solely from an examination of the plat and the instruments in question. Through investigation it was shown that improvements had been made in the south half of 95th street and in the north half of 99th street. It was also shown that in 1891 Jackson Park Jockey Club as the owner of the property east of Michigan avenue had given its written consent to the laying of street car tracks in Michigan avenue.

Against this it appeared that by the institution of condemnation proceedings in 1901 for the opening and widening of State street, the city had practically acknowledged the validity of the deed of vacation for the west 53 1/3 acres, filed in 1879.

These facts and certain decisions of our Supreme Court

which held that the acceptance by a municipality of one or more streets in a subdivision without any words showing an intent to limit its acceptance to the particular streets, was an acceptance of all the streets in the plat, were deemed sufficient by me to resolve existing doubts in favor of the city.

In 1912 the Pullman Land Association as owner of the west 53 1/3 acres in Holmes' Subdivision, applied for an ordinance of vacation of certain streets in the north 20 acres and all of Thornton Road. The County of Cook had selected this site for a branch hospital and had contracted to purchase the property if the streets and alleys lying within the tract could be vacated.

From the abstracts submitted at that time it appeared that Holmes had acquired this tract from James H. Bowen, who, in June, 1871, had given a trust deed to the International Bank, which was still in force when the plat of Holmes' Subdivision was recorded in October, 1874. The bank did not join in the making of said plat, but subsequently acquired the tract of land through foreclosure proceedings.

This rendered that part, at least, of the plat of Holmes' Subdivision inoperative and void.

However, I had held the deed of vacation filed by the bank in 1879 void in part for the reason that Thornton Road and 95th street were highways laid out according to law and could not, therefore, be vacated by deed.

The Pullman Land Association finally agreed to dedicate the west half of Michigan avenue and acknowledge the legal existence of the south 50 feet of 95th street and the north 33 feet of 97th street. An ordinance was then passed vacating Thornton Road and other streets and alleys lying within the 20 acres tract upon the nominal consideration of \$500.

After this ordinance had been disposed of the Committee on Local Transportation notified the Chicago City Railway Company which operates the lines of the Calumet Electric Street Railway Company under an ordinance passed March 30, 1908, to rehabilitate its roadbed and tracks in the east half of Michigan avenue.

The company resisted upon the claim that the east half of Michigan avenue, so called, was not a public street, but

private property and that the present owner of the same had given the company a license to use his land.

July 25, 1912, the law department advised the chairman of said committee of the written consent given by the owner in 1891 and that the city should maintain that it has rights in Michigan avenue. It was then intimated that the whole question would sooner or later find its way into the courts.

The matter rested for about a year when through the courtesy of the Chicago Title and Trust Company a complete title search was furnished, which showed that before recording his plat in 1874 Holmes had given fifteen separate trust deeds upon as many parts of the east two-thirds of the whole tract, all of them describing the property as lands. None of the trustees named in said trust deeds had joined in the making of the plat, but all of them were subsequently foreclosed and this avoided this part of the Holmes' plat under the decisions of our Supreme Court, except in so far as the south 50 feet of 95th street and the north 33 feet of 99th street were concerned. The city had levied special assessments for water mains and sewers in said streets and the owners in paying these did acknowledge their legal existence.

From the foregoing it clearly appears that in recommending for passage the ordinance now before your committee a situation is made absolutely plain which otherwise can only be dealt with in long drawn out litigation the final result of which is very uncertain.

Judging from late decisions of the Supreme Court in similar cases, much less complicated, it is my opinion that the ordinance which embodies a statutory dedication is much to be preferred. The city thereby gets the fee title in all streets and alleys; whereas now it can only claim an easement in them for public travel, and this easement must first be established in the courts.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 24, 1914.

HON. M. FERRY, Commissioner of Public Service.

Dear Sir:

In the matter of your inquiry of June 19, 1914, as to whether your department has jurisdiction over concessions at amusement parks operating "rides and chutes," we desire to say that these concessions do not come within the scope of the ordinance creating the department of public service.

The term "public utility" is defined in Section 9, of the ordinance, and is in general terms. The only portion of the definition which might at first glance be deemed to refer to these concessions is that part which includes "any plant, equipment or property used or to be used for or in connection with the transportation of persons or property." This, we believe, is intended to and does refer to the business of common carriers, and we do not believe that amusement park companies fall within the scope and definition of a common carrier.

A common carrier or any other public utility almost as a universal rule occupies some part or portion of the public streets and must have a license or franchise so to do. This is not true of amusement companies, and, further, common carriers must and can be required to carry for the general public and without discrimination and may be compelled to maintain and operate their service or be subjected to forfeiture of license or franchise. Such is not the case with amusement companies.

"Common carrier" is defined in the state public utilities law as follows:

"The term 'common carrier,' when used in this Act, includes all railroads, street railroads, express companies, private car lines, sleeping car companies, fast freight lines, steamboat lines and other common carriers by water, and every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating or managing any such agency for public use in the transportation of persons or property within this State."

We are of the opinion that it was in the sense of the foregoing definition that the ordinance creating the public

service department includes and refers to transportation of persons and property, and that construing according to the meaning of the foregoing definition the "rides and chutes" would not be included. Other differences might be pointed out, but these we deem sufficient in answer to the question submitted.

Yours respectfully,

JAMES SKINNER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 27, 1914.

HON. EUGENE BLOCK, Chairman Committee on Local Transportation.

Dear Sir:

We have your letter of the 24th inst., in regard to the above entitled matter.

We have read the opinion on the subject of deadening noise on the union loop to which you refer in this communication. This opinion is dated November 1, 1909, and was prepared by Mr. Edwin C. Cassels and approved by Mr. Brundage the then corporation counsel.

The opinion is very voluminous and covers nineteen pages of typewritten matter. It deals especially with the question of deadening the noise on the loop; but, subject to certain unimportant qualifications not necessary to be here noticed, its conclusions are general, and would apply to all elevated railroads running in streets within the city limits. We concur in the conclusions reached in this opinion. Probably, in many of the cases in which the elevated railroads run near to schools, they are not running in streets; but are running on their own rights-of-way, except where they cross streets. We do not think that this would make any difference so far as regards the right of the board of education to sue for damages for unnecessary noise in the vicinity of schools, or the right of the city to declare such unnecessary noise in such vicinity to be a nuisance.

In the case of *Aldrich v. Metropolitan West Side Ele-*

vated Railroad Company, 195 Ill. 456, the elevated railroad was running on its own right-of-way except where it crossed streets. The action was for damages arising from noise, vibration and other causes.

There was no allegation and no proof that the noise was greater than was reasonably necessary in the operation of the railroad. The right of action was denied; but the court said on page 464 of the opinion:

“Such consequences of the construction and use of railroads must be borne by all living near them, without complaint and without hope of redress, for they are inseparable from the purposes and objects of such structures, but that a recovery can and should be had for such damages as arise out of the careless and negligent acts of a railroad company in regard to any usual and necessary appurtenance to their road cannot be denied.”

And again on pages 465-466:

“In the case at bar the trains were run by electricity, and it is not contended that there were thrown or deposited on the plaintiff's property any cinders or other material substances, nor that there was any unusual noise or vibration or jarring of the earth.”

These passages seem to imply the right of action in a case such as this if more noise is made than is reasonably necessary in the operation of the railroad.

In concluding the opinion above referred to Messrs. Brundage and Cassels say:

“The safe course for the city to pursue is to determine first, the changes and improvements that may be made in order reasonably and practically to minimize the noise; and secondly, to fix upon such changes and improvements as will not change materially the character of the structure as prescribed and authorized by the ordinances, and thereafter to proceed to secure these changes and improvements as has been indicated.”

In pursuance of the advice here given, we would suggest that it will be well to first ascertain as definitely as the case admits of just what the city wants the companies to do in order to lessen the noise. In ascertaining this, it must be borne in mind that the ordinances, under which the companies are operating, specify with a considerable degree of minuteness the details of the structure which they are to

erect. It is, therefore, very desirable that the improvements to be required should not be such as to change materially the character of the structure.

When the character of the improvement which might reasonably be required for the purpose of deadening the noise has been ascertained, an ordinance might then be passed declaring it a nuisance to run elevated trains within a certain distance of schools without the specified precautions against noise having been taken and prescribing a penalty for each violation.

If such an ordinance were passed, the companies would, as a matter of course, at once take steps to test its validity; and in that way the question of what the city could and could not do in the way of preventing unnecessary noise near to schools could be threshed out and determined.

Yours respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 27, 1914.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In your letter of June 17, 1914, you suggest that immediate legal proceedings be instituted to compel compliance with the ordinance providing for the extension in Robey street from 47th to 63d streets. The extension is a forced one as provided in Section 3 of the ordinance of February 11, 1907, providing for compulsory extensions.

Section 3 of said ordinance of February 11, 1907, provides that the company is obligated within three years after the acceptance of said ordinance to construct and equip such additional extensions as may be required by the City of Chicago and to operate such extensions as part of its system *upon the order of the city council of the City of Chicago*, provided that the company shall not be obligated to construct more than four miles of double track street railway or eight miles of

single track railway in any one calendar year during the term of the grant.

Acting under the aforesaid provision, the city council on September 30, 1912 (Council Journal, p. 1832), passed an order calling upon the company to construct an extension in South Robey street from 47th street to 69th street. Said order further provided that the extension should be completed and in operation not later than December 31, 1913.

While the city has complied with Section 3 of the ordinance of February 11, 1907, in having an order passed by the city council calling upon the company to construct the above extension, nevertheless, we believe that before the company can be declared in default the city should be able to prove that the company's attention has been called to the passage of this order.

Neither the city clerk nor the secretary of the local transportation committee can give us any evidence that the company knew that this order has been passed by the city council. While in all probabilities the company knows that this order has been passed, nevertheless, it is necessary that we should be able to demonstrate this fact by legal proof.

On July 22, 1912 (C. J., page 1438), the council passed an *ordinance* authorizing and *requiring* the Chicago City Railway Company to construct an extension in Robey street between 47th street and 63d street. The ordinance provided that the entire line be constructed by December 31, 1913, and said line was to be considered as one of the compulsory extensions for the calendar year 1913. The ordinance contained the usual clause to the effect that if said ordinance was not accepted by the company within a certain number of days the ordinance should be null and void.

This ordinance has never been accepted by the company. It was found necessary to extend the time of acceptance on several occasions by amendments to the ordinance, in order to prevent the ordinance from becoming invalid for want of acceptance, thus vitiating the frontage consents which had been filed prior to the passage of the ordinance. The ordinance was last amended on April 27, 1914 (C. J., p. 37). Under this last amendment the time for the completion of this

extension was extended to July 1, 1914. Unless the ordinance is accepted on or before this last date, the ordinance will become null and void.

This ordinance may be construed as an "order of the city council," since the ordinance provides that the company is *authorized* and *required* to construct the extension.

While the secretary of the local transportation committee has referred to this ordinance in some letters he has written to the company, and while some conversation has taken place between Mr. Busby of the company and yourself, nevertheless, we believe that the city council should at this time pass an order formally calling the attention of the company to the ordinance passed July 22, 1912, and requiring said company to have said extension completed and in operation within the time limits set out in the ordinance. Said order should also contain a provision that in case the company does not comply with said order said company should be considered in default.

Upon the passage of this order we will have the secretary of the local transportation committee inform the company by registered letter of the passage of such order so that there will be no question but that the company will have had proper notice. We have prepared and are transmitting herewith an order which should be passed by the council at once.

If the order is passed and the company fails to complete said extension within the time specified in the ordinance, it will be in default with respect to the ordinance of February 11, 1907. If such default continues for a period of three months then the city will have the right to declare the ordinance of February 11, 1907, forfeited and at an end.

As above stated under the last amendment to the ordinance the time of acceptance was extended to July 1, 1914. In order to prevent this ordinance from becoming null and void for lack of acceptance on this date, we believe that this ordinance should be amended by striking out any reference to acceptance of the ordinance by the company. We are

transmitting herewith a draft of such amendment. This ordinance should likewise be passed at once.

Yours respectfully,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 29, 1914.

DANIEL S. WENTWORTH, Esq., Westminster Building, Monroe and Dearborn Streets, Chicago, Illinois.

Dear Sir:

We have your letter of May 28th, in regard to the above entitled matter.

The specific question which you ask in this letter, as we understand you, is whether there is in the Illinois Reports any case directly deciding that the city has the right to charge a fee for an annual inspection of buildings.

We answer that we have not been able to find any such case.

We may, however, add that we entertain no doubt as to the existence of the power in the city, provided, it is held that an annual inspection is a reasonable requirement in the interests of the public safety. Amongst the authorities which we would rely on as supporting this conclusion are the following:

Consolidated Coal Company v. People, 186 Ill. 134.

St. Louis Consolidated, etc., Co. v. Illinois, 185 U. S. 203.

C. W., etc., Coal Co. v. People, 181 Ill. 270.

St. Louis v. Graffman Dairy Co., 1 L. R. A. ns. 936 (see p. 940).

You will note that the Illinois law held valid in the first two cases above cited provided for the inspection of coal mines

at least four times a year, and for the payment of a fee for each such inspection by the owner of the mine.

Yours respectfully,

WM. DILLON,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JUNE 29, 1914.

HON. HENRY ERICSON, Commissioner of Buildings.

Dear Sir:

Your letter of the 24th inst., requesting our construction of Section 710 of the Chicago Code of 1911, which relates to the erection and maintenance of illuminated and other roof signs is at hand.

Paragraph "a" of Section 710 defines the signs regulated by the paragraphs following same and includes signs which may or may not have all of the lights thereon studded with incandescent lights; provided, 50 per cent. of the surface of said *sign* is open so that the wind can pass through the same. In determining whether or not 50 per cent. of the surface of the face of the sign is affected by wind pressure the outside dimensions of the face of the sign only are to be considered and the space between the top of the roof and the bottom of the sign placed on the same cannot properly be considered.

Paragraph "b" provides that "any illuminated roof sign, less than twelve feet in height, shall be exempt from the provisions of this section and shall be held to be governed by the ordinance of the City of Chicago relating to billboards and signboards." This exception applies only to illuminated signs as defined by the first sentence of paragraph "a" of Section 710, and exempts such signs from the provisions of Section 710 relating to wind resistance, inspection and fees, but subjects such signs to the requirements pertaining to those subjects which are prescribed in the preceding sections as applying to billboards and signboards.

Paragraph "c" of Section 710 does not apply to illuminated roof signs less than twelve feet in height.

Having construed the first three paragraphs of Section 710 so far as seems to be necessary in answering the questions submitted by you, we shall now take up the question of your power to issue temporary permits as referred to in your letter. We have no hesitancy in advising you that temporary permits may be issued, although no express provision permits the same, in cases where the work authorized by the permit is permissible under the ordinance. However, where the ordinance prohibits the erection of certain classes of signs, in the absence of any express provision, you have no power to authorize for even a short period the erection or construction of such signs in cases where legal permits cannot be issued.

In conclusion we beg to say that if Section 710 presents any question not herein answered we will gladly give such further interpretation of the same as you may desire.

Very truly yours,

LORING R. HOOVER,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 29, 1914.

To the Honorable the City Council of the City of Chicago.
Gentlemen:

On May 4, 1914, your honorable body passed an order requesting the corporation counsel for an opinion as to whether or not the city council can by ordinance limit the campaign expenses for aldermen and other municipal officers, and, if so, to what officers such powers of limitation apply. (See Council Journal of May 4, 1914, at pages 105 and 106.)

We assume that the object to be accomplished by any such ordinance that is contemplated by the order would be to disqualify any person elected to any municipal office from holding such office or performing the duties thereof if his campaign expenses as a candidate were beyond the limits prescribed.

The legislature has not delegated to the city council the

express power to pass such an ordinance. If the council has such power it must be derived from the authority granted to the city council to pass all ordinances, rules and make all regulations, proper or necessary to carry into effect the powers granted to cities or villages.

By virtue of the 71st clause of Section 1 of Article V of the City and Village Act, the city council is authorized "to provide by ordinance in regard to the relation between all the officers and employes of the corporation in respect to each other, the corporation and the people.

Undoubtedly, the city council has authority to expel any of its members for misconduct in office, either by reason of the last quoted provision or by virtue of the common law powers of corporate authorities. But this power does not extend to any act committed by a person prior to his election to office. Nor does the authority to make rules governing officers and employes of a corporation authorize the city council to prescribe qualifications for holding office. Such power is lodged only in the legislature, and the legislature has, in fact, exercised its power in that direction by making provisions relating to the qualifications of municipal officers elected by the authority of the City and Village Act.

We are of the opinion that the city council has no power either to add to or detract from the qualifications prescribed by the statute, and, therefore, it has no power to pass such an ordinance as is contemplated by the order heretofore referred to.

Respectfully submitted,

JOS. GROSSMAN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JUNE 29, 1914.

HON. HIRAM VANDERBILT, Chairman, Sub-Committee of Committee on Buildings and City Hall.

Dear Sir:

You referred to this department a petition for a special permit to construct a building two hundred and sixty feet

high at the southwest corner of Jackson and Michigan boulevards, together with the Mayor's letter in relation thereto, and you ask three questions which we set forth below with our answers to same.

The first question you ask is as follows:

"Has the City Council the legal right to pass an order permitting the erection of a building two hundred and sixty feet high at the location indicated in the said petition, which is hereto attached?"

In the face of an ordinance limiting the height of buildings to two hundred feet, an order of this kind would be clearly invalid. The provisions of an ordinance cannot be rendered nugatory by the passing of an order in conflict therewith. In order to overcome the force of same it is necessary to amend or repeal the existing ordinance by a legislative act of equal dignity. In other words, it must be done by ordinance.

We assume, however, that your inquiry includes the question whether an ordinance granting a special privilege of this character can be passed that would stand the test of validity. While this raises a different question, it must also be answered in the negative.

The attention of the writer was called to an ordinance of a similar nature passed by the City Council on March 25, 1901 (C. J. 2487), which authorized The Tribune Company to erect a higher building than was at that time permitted under the ordinances of the city. This ordinance does not even contain the usual provision to repeal ordinances and parts of ordinances in conflict therewith, so that it was clearly a special ordinance in direct conflict with the general ordinances then in force. We are not advised as to whether the question of validity was raised, but feel certain that if it had been contested the ordinance would have been held invalid.

Special privileges are frequently granted by ordinance even to the extent of turning over portions of streets and public places to what appear to be private uses. But however far removed from a public use the exercise of the privileges may be, the theory under which the privilege is granted is that the public interest will be served in some way. It is different in this case, where an ordinance such as proposed

would simply authorize a course of conduct at variance with that prescribed for others.

A general ordinance must apply to all parties of the class coming within its provisions alike. Any exception created by the wording of same would render such an ordinance invalid. It follows that such an exception cannot be created by the passage of a special ordinance which is intended to accomplish the very thing that the City Council by general ordinance could not legally do.

It has been suggested that in such a case as this no one would have the right to object if the City Council saw fit to grant such a special privilege, because no one's rights would be adversely affected. There may be some point in this, because ordinarily a person who undertakes to compel the enforcement of a city ordinance must have some substantial interest at stake or its enforcement must be a matter of such concern to the general public that private rights need not be taken into consideration. But we do not consider it proper for us to go into this matter, since it does not alter the legal aspect of the situation. However, it was held in *Field v. Barling*, 149 Ill. 556, that a very slight easement concerning light and air is sufficient on which to base an action in such a case.

We are therefore of the opinion that the City Council cannot legally grant such a special privilege either by order or by ordinance.

Your second question reads as follows:

“Could the City Council pass an ordinance, which would be valid, creating a zone or zones within the City of Chicago within which buildings could be erected of a height greater than the height of buildings permitted in the remainder of the City?”

We believe it is within the power of the City Council to create a zone of this character, provided there is some reasonable basis for making a distinction. It cannot arbitrarily select a street or section of the city and give the privilege of erecting high buildings to the owners of property in that particular place, but if the geographical or topographical conditions, the nature of the soil or the facilities for transportation are such as make a distinction desirable and the carving

out of a zone or district reasonable, the legislative power of the City Council can meet the requirement.

Thus, on the theory that the business section of the city is hemmed in by natural and artificial barriers that cannot be overcome, the creation of a zone with these barriers as the boundaries would probably be upheld as a reasonable exercise of legislative power.

In a leading case involving the City of Boston, where there were in fact no such real barriers, the Supreme Court of Massachusetts went farther than we have indicated above. In *Welch v. Swasey*, 193 Mass. 364, the question was squarely presented whether the legislature, in regulating the height of buildings in a city, had the right to permit them to be higher in the sections where there is a call for office space than in the residential portions although the streets in the former were narrower than in the latter, and it was held that such right did exist. (Affirmed by U. S. Supr. Ct., 214 U. S. 91.)

We are not entirely satisfied with the soundness of this decision, but it is at least respectable authority for the proposition involved in that case and *a fortiori* may be regarded as carrying even greater weight when applied to conditions which we have suggested where the reason for making a distinction is more pronounced.

The court in that case says:

“The next question is whether the general court may establish different heights for different neighborhoods, according to their conditions and the uses to which the property in them is put. The statute should be adapted to the accomplishment of the purposes in which it finds its constitutional justification. It should be reasonable, not only in reference to the interests of the public, but also in reference to the rights of land owners. If these rights and interests are in conflict in any degree, the opposing considerations should be balanced against each other, and each should be made to yield reasonably to those upon the other side. The value of land and the demand for space in those parts of Boston where the greater part of the buildings are used for purposes of business or commerce is such as to call for buildings of greater height than are needed in those parts of the city where the greater part of the buildings are used

for residential purposes. It was therefore reasonable to provide in the statute, that buildings might be erected to a greater height in the former parts of the city than in the latter, even if some of the streets in the former are narrower than those in the latter.'

Welch v. Swasey, 193 Mass. 364.

It is true that the action in the above case was taken by the legislature, and the extent of the authority of the City Council was not involved. But we are assuming, in this opinion, that the City Council has the right to limit the height of buildings, and, if it has that right, the decision is directly in point. The question of the power of the City Council to limit the height of buildings has received the attention of the law department in former administrations, and has always been upheld as an implied power which exists by necessary inference under the express powers granted.

We, therefore, give it as our opinion that a zone or zones in the manner outlined above may be created by the City Council within which higher buildings may be constructed than in other parts of the city. In saying this, however, we do not wish to be understood as pointing out that method as a good one to be followed if there is any distinction to be made. A much better way of prescribing districts where high buildings may be permitted, and one which would be based on more sound and reasonable grounds, would be to permit tall buildings on wide streets or streets on which there is an open common on one side.

This brings us to your third question, which is as follows:

"Could the City Council pass an ordinance, which would be valid, permitting the erection of buildings of a greater height than 200 feet—the limit in the ordinance now in force—on streets in the City of Chicago which have a width of 200 feet from lot line to lot line?"

An ordinance limiting the height of buildings in accordance with the width of the streets on which they abut, as stated above, would be free from many of the objections which might be urged against the creation of zones. There is no doubt that a classification based on the width of streets could be made that would be reasonable, and it is the best basis for such a classification under the conditions which exist here,

because considerations of light and air affecting the people in the street and in the lower floors of other buildings would enter into the classification.

A limitation of height based on the width of streets is at the present time incorporated in our building laws. Section 438 of The Chicago Code of 1911 prohibits the erection of tenements which exceed the width of the street more than one-half unless the building is set back on the lot a distance corresponding to the additional height. Consequently, it may be said that the principle of basing the height of buildings on the width of the street is already recognized by the city ordinances.

In the present instance, if the City Council should find it desirable to do so, an ordinance could be drawn permitting higher buildings on a number of streets of great width or on a number of streets with open ground fronting same on one side. Again, an ordinance could be drawn combining the two in such a way that tall buildings would be permitted only on exceptionally wide streets where one side is open, thereby limiting its application very much. In this way, while the ordinance would be general, it would be effective only in a few places and possibly only in one place. The lake front from Randolph street to Park Row presents a peculiar condition which might be the only one affected by a general ordinance of this character.

Such an ordinance, while in effect it may legislate as to one particular place, must still be regarded as a general ordinance, under the same rule that admits of legislation peculiarly adaptable to the City of Chicago as a city of more than 100,000 inhabitants. This method of legislating for the City of Chicago has been held proper by our courts in all cases where there was a reason for making the classification.

We believe, therefore, that the City Council has the right to pass such an ordinance as is suggested by your last question.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
Corporation Counsel.

JULY 1, 1914.

HARRY G. WILSON, Esquire., Secretary The Chicago Public Library, Chicago, Illinois.

Dear Sir:

In your letter of recent date you state that a member of the Library Board who has been re-appointed by the mayor for a term of three years is unable to qualify on account of his absence from the city.

You also submit a copy of Article I of the by-laws of The Chicago Public Library, which provides that the annual meeting of the board of directors for the election of a president and vice-president shall be held as soon as is practicable after the 1st day of July, and "after the new directors shall have been appointed and have qualified."

You ask to be advised concerning two questions which have arisen on account of the absence of the re-appointed member.

Your first question is whether, under Section 5 of the Library Act and under Article I of the by-laws of the board, the Library Board can organize for the election of a president and vice-president during the absence of such re-appointed member.

We see no reason why the regular annual meeting of the board of directors should not be held as usual. It has been the custom for members of the Library Board to take an oath of office before the city clerk, but it is at least doubtful whether this is a necessary formality.

The statute relating to libraries says nothing whatever about such directors qualifying in any way. Section 3 of the statute provides that directors shall hold office for three years and that the mayor shall, before the 1st of July of each year, appoint three new directors to take the place of retiring directors, "who shall hold office for three years, and until their successors are appointed." Section 5 of the same statute provides that the directors shall, "immediately after appointment," meet and organize by the election of a president and such other officers as they may deem necessary.

Inasmuch as the statute does not require such appointees to subscribe to an oath of office, the only reason for doing this

would seem to be the provision of the Cities and Villages Act which requires all city officers to take an oath of office and to file a bond in such sum as may be prescribed by the city council. This provision, however, relates only to such city officers as are embraced within the provisions of the Cities and Villages Act. It does not include directors of the public library.

It was held in the case of *People ex rel. v. Healy*, 231 Ill. 644, that the members of the Board of Education were not officers of the city in the sense that they were brought within the terms of the provisions relating to such officers in the Cities and Villages Act. The same holds true with regard to directors of the public library, and while both the school system and the library are for certain purposes to be regarded as departments of the city government, it cannot be said that the members of the two boards are required to conform to the provision of the statute above referred to concerning the taking of the oath and filing of the bond.

Consequently, under the statute the Library Board is supposed to organize immediately after the appointment of the three members that were appointed for the current year.

The provision in the by-laws of the board to the effect that such organization shall take place after the new directors shall have qualified is without force, in view of the fact that they become invested with all the powers of office immediately after July 1st, the date on which the appointment takes effect.

Our answer to the first question practically takes care of the second question you ask, which is, whether, under the statute and the by-laws referred to the board can elect such absent member who has not qualified as an officer of the board.

Since the member is not required to qualify by law, he is to all intents and purposes a member of the board the same as the others, and can be elected to office. In any event, even if it were necessary for him to take the oath of office, he would be eligible in the present instance because he is a re-appointed member and succeeds himself. Under the statute, he retains his office until his successor is appointed,

and if there were a qualification necessary he would necessarily retain the office until his successor qualified. Therefore, no question can arise as to the propriety of electing him to any position within the province of the board.

While the question does not actually arise in this case by reason of the matters set forth above, we wish to state, in addition, that even if a member of the board would have to qualify before he assumes the duties of his position, the mere fact that one member of a body of nine has not done so would not interfere with the organization. It must be plain to you that if that were the case one prospective member could obstruct the organization of the board by simply remaining away.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 2, 1914.

To the Honorable The City Council of the City of Chicago:
Gentlemen:

On June 22, 1914, the following council order was passed by your honorable body:

"ORDERED, That the corporation counsel be and he is hereby directed to submit to this council at its next meeting, an opinion as to the rights of the City of Chicago to grant street railway privileges in all cases where the present companies have failed to extend their lines, or, whether the city council may not grant street car privileges in any streets of the City of Chicago irrespective of the existing ordinances."

(See page 880 of Council Journal of June 22, 1914.)

As I read the order, there are several propositions involved therein which may be categorically stated in the following manner:

CLASS I.

Streets where extensions are covered by the 1907 and subsequent traction ordinances.

This class may be divided into two subdivisions: (a) those streets on which the railway companies have been notified to make extensions (under the authority vested in the city under the 1907 and subsequent ordinances) and have failed to perform the conditions pre-requisite to the passage of a proper ordinance, and (b) streets where the conditions precedent—such as the necessary publication of the time and place of the application for the ordinance—have been given and frontage consents along the streets secured, but where the railway companies have neglected to accept the ordinance or ordinances.

Considering first, subdivision (a), Section 3 of the 1907 traction ordinance under the head “Extensions” provides as follows:

“SECTION 3. The said City shall have the right subject to the limitations contained in this ordinance, at any time to require the Company to make extensions of any additions to the lines of street railway enumerated in said ‘Exhibit A.’ Such extensions and additions shall be made under the supervision of the Board of Supervising Engineers, as hereinafter in Section 7 provided, and the cost thereof shall be determined as provided in said section. The character and quality of such work shall comply with the specifications set forth in said ‘Exhibit B,’ so far as the same may be applicable thereto.

“The Company shall promptly and within a reasonable time after the passage of this ordinance construct and equip the extensions of its street railway system provided for in ‘Exhibit A,’ *and also in Section 38 hereof, subject to the provisions of said Section 38*, and shall operate the same as a part of its system in conformity with the provisions of this ordinance, and at any time after three (3) years from the acceptance of this ordinance, the Company shall upon the order of the City Council of the city, construct and equip such additional extensions as may be required by the city and shall operate the same as a part of its system in conformity with the provisions of this ordinance, provided, that the Company shall not be obligated hereby to construct and operate any such additional extensions in any street or public way nearer any then existing parallel street railway tracks of the Company than one-half mile, and that the Company shall not be obligated hereby to construct more than six miles of double track railway or twelve miles

of single track railway in any one calendar year during the term of this grant.

"The Company shall, however, upon the order of the City Council of the City, construct, equip and operate such extensions of its street railway system in addition to those hereinabove provided for as may be required by the City Council subject to the conditions and limitations contained in Section 26 of this ordinance.

"The Company shall not be authorized or obligated to construct any extension of its street railway system upon streets on which street railways are not located when this ordinance goes into effect until the City has granted to the Company whatever authority in addition to this ordinance may be necessary to comply with the frontage consent laws of the State of Illinois."

This section, as will be seen, provides for the construction and operation, upon the order of the City Council and as a compulsory measure, of such additional extensions as shall not exceed the limitations in the section prescribed. In addition to these so-called compulsory extensions, the city has the right to require the company to make extensions on streets enumerated in Exhibit A of the ordinance, which comprises a large number of streets wherein many extensions have already been constructed.

A third class of compulsory extensions is provided for in the section, in addition to the two before mentioned, subject to the conditions of Section 26 of the ordinance, which, in effect, limits these particular additional extensions so as not to reduce the return on the capital investment of the companies to an inadequate or unreasonably small amount.

In the case of all the traction companies, with the exception of the Chicago City Railway Company, the statute provides (Chapter 131a, Hurd's Revised Statutes of Ill., Section 3) that no consent to locate or construct a railway shall be granted to any company "unless at least ten days' public notice of the time and place of presenting such petition shall have first been given by publication in some newspaper published in the city or county where such road is to be constructed * * *."

In order to compel the street railways to make certain extensions, it has frequently been the practice of the council to pass a mandatory order upon the particular company, the

lines whereof are desired to be extended, directing it to take all necessary steps to fulfill the conditions precedent to the passage of the ordinance. When these steps have been taken and the requisite notice given, an ordinance is passed directing the extension and such ordinances have been in the past uniformly accepted by the companies. The reason for exempting the Chicago City Railway Company from this procedure is that the statute only applies to companies which have been incorporated under the general laws of this State, and the Chicago City Railway Company has been granted its rights by special acts of legislature prior to 1870.

In the case of extensions in the class above enumerated, I am of the opinion that, where these extensions are upon streets not enumerated in Schedule A of the 1907 ordinances, the failure of the company to take the necessary precedent steps so that the City Council can pass an ordinance, or their failure to accept an ordinance after passage, leaves the city free thereafter to grant track rights in such streets to other companies.

As regards the particular extensions on streets enumerated in Exhibit A, should the companies, after the direction by the City Council, refuse or neglect, within a reasonable time after the passage of such ordinance, to construct, equip and operate such extensions (provided requisite frontage consents are on file), I am of the opinion that with regard to these streets, independent ordinances may be granted to other companies to operate street railway lines in such streets, subject, of course, to the frontage consent provisions of the statute.

To recapitulate what has been said above, Section 3 is a reservation of certain rights to the city, and is not a grant of privileges to the company. This reservation includes the power on the part of the city to order certain extensions: first, on those streets designated in Schedule A; second, those covering a certain limited annual mileage construction of track, and, third, other and additional construction limited so as not to impair a fair return of the capital investment.

In each of these cases where the city has ordered the extension and the company has failed to make the same,

either through non-performance of the necessary preliminary steps, failure to accept the ordinance when passed, or a failure to comply with the ordinance when and as passed, then the city has the right to grant privileges in the street to other companies.

The foregoing must not be held to express in any way the idea that the redress of the city, on account of a breach of the ordinances in the methods above specified, is limited to granting rights to other companies.

(b.)

With respect to streets where the necessary publication has been made by the petitioning company of the time and place of its application for ordinance rights, and proper frontage consents of property owners have been secured but the railway companies have neglected to accept the ordinance or ordinances.

In such event, the City Council may, in its discretion, grant an enlargement of such ordinance rights by way of amendment in order that the company may have a later date to accept the same, or it may treat the ordinance as null and void, by reason of non-acceptance, and grant other or the same rights to other companies in the street or streets covered by the previous extension ordinance.

CLASS II.

Streets wherein rights have been granted to existing companies, and which are now being occupied by the tracks of said companies under the 1907 and subsequent ordinances.

With respect to these streets, it is a matter of serious doubt as to whether the rights of the companies to maintain and operate their existing tracks can be abridged before 1927 unless upon default of the ordinance obligations, but neither the 1907 or subsequent ordinances give a monopoly of these streets to the grantee railway companies, and the council, if it sees fit, may grant additional street railway rights to other companies in streets where tracks are now located and being operated by existing companies.

CLASS III.

With regard to streets vacant both with respect to ordinance rights to companies and with respect to actual tracks in such streets.

I am of the opinion that independent rights to other than the existing railway companies may be granted at the pleasure of the council, provided, of course, the statutory conditions and limitations are complied with with respect to public notice and frontage consents.

To again make a resume of the foregoing, it may be stated as a conclusion that:

1. Where orders have been directed to the companies to build extensions, and with which orders the companies have neglected to comply, then such track rights may be granted to other companies;

2. Regarding streets already occupied by the tracks of existing companies, these rights are not exclusive of the power of the council to grant rights to other companies to lay and operate additional tracks in the streets, provided that such construction and operation does not impinge upon the ordinance rights already vested in the traction companies, and when the term "rights" is used in this connection, the rights of physical operation are referred to;

3. With regard to streets not now embraced by traction ordinances or whereon the tracks are not laid, these streets can be dealt with *ab initio* and new rights granted to companies as council may deem proper.

Respectfully submitted,

JOHN W. BECKWITH,

1st Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JULY 2, 1914.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Replying to your letter of July 1st, relative to salary of city's representative on boards of supervising engineers, we beg to advise you as follows:

The 1907 ordinances provide for a compensation of \$100

per day for attending meetings or attending to the business of the board, and living and traveling expenses in addition thereto when he is out of the city. The ordinances also provide that the salary of such member shall not be less than \$3,600 nor more than \$10,000 per annum.

The provisions in the Calumet & South Chicago Railway Company ordinance are the same with reference to a compensation of \$100 per day, and provide that the salary of the member on that board shall not be less than \$1,500 nor more than \$3,500 per annum.

As you will observe, it leaves it to the board to fix the compensation of both the city's and the railway company's members thereof at any point between the minimum and maximum.

As a matter of fact, for the fiscal year ending January 31, 1913, Mr. Weston, as the city's representative, was paid a salary of \$5,000 on board No. 1, and \$1,600 on board No. 2, making his salary, on the two boards, \$6,600 for that year.

For the six months ending July 31, 1913, Mr. Weston's compensation on board No. 1 was \$3,100, and the compensation on board No. 2 was \$1,350, making a total of \$4,450.

Yours respectfully,

CHAS. M. HAFT,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JULY 2, 1914.

HON. GEORGE PRETZEL, Chairman Sub-Committee of Committee on Buildings and City Hall.

Dear Sir:

We have your letter of the 10th ult., requesting the opinion of this department upon the power of the city to require all elevators to be equipped with automatic safety cocks.

There is no express provision in the Cities and Villages Act authorizing the City Council to pass such an ordinance as is referred to. The City Council, has, however, the power to regulate the construction, repairs and use of *areas*, the manner of constructing buildings and the power to pass and

enforce all necessary police ordinances. (See Clauses 657, 61 and 66 of Section 1, Article 5, Cities and Villages Act.)

The tendency of our Supreme Court has been to sustain all ordinances which are aimed to guarantee the safety of the public. In this instance, the danger against which the proposed ordinance will guard the public, is the falling of an elevator through a shaft or areaway. We believe that under the power to regulate the use of an area coupled with the power to regulate the manner of the construction of buildings and the power to pass all necessary police ordinances, an ordinance such as is proposed in your communication may be sustained by the courts.

Respectfully submitted,

JOS. GROSSMAN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

JULY 2, 1914.

HON. EUGENE BLOCK, Chairman Local Transportation Committee.

Dear Sir:

I have received a communication from your secretary asking for an opinion as to the right of the city to exact transfers from the traction surface companies at 79th and Halsted streets.

It appears from the statement of Alderman Fisher and others that up to two years last past and up to and within a short time ago, transfers were issued at this point to passengers boarding north-bound cars at Halsted street and desiring to change to through route No. 8 cars, but lately, the Chicago City Railway Company has refused to honor transfers from Halsted street cars to through route No. 8 cars at this point. The change is said to have caused a great inconvenience to the patrons of the lines coming from south of 79th street, but the companies have taken the position that transfers will only be issued at those points north of 79th street to through route No. 8 where the several local lines terminate.

To state the case concretely, a passenger traveling on a local line from south of 79th street and desiring to transfer on through route No. 8 would have to wait until the local line reached its terminus north of 79th street before he could effect such transfer, the practical result of which is that he would there have found a car already crowded, whereas if he could effect the transfer at 79th street he would get a less crowded car.

The 1907 traction ordinances provide (Section 11) that
 “* * * Said transfer shall entitle such passenger to ride upon any other line of said street railway system owned, leased or operated by the company or any other line of street railway operated by any other corporation from which the company is by this ordinance obligated to accept transfers, which connects with, crosses, intersects or comes within a distance of two hundred (200) feet of the line of said street railway upon which the passengers first took passage and paid his fare. * * *”

The section further provides:

“In every instance the transfer given to a passenger may designate the point or place of transfer, and the same must be used at such point or place.* * *”

The ordinance of November 13, 1913, does not materially affect the question in point, but by the terms of that ordinance it is to be regulated under the provisions of the 1907 ordinance.

One of the provisions of the 1907 ordinance is the reservation of the police power contained in Section 35, whereby the city reserves “the right to make all regulations which may be necessary to secure in the most ample manner the safety, welfare and accommodation of the public, including among other things the right to pass and enforce ordinances to protect the public from danger or inconvenience in the management and operation of street railways throughout the said city, and the right to make and enforce all such regulations as shall be reasonably necessary to secure adequate and sufficient street railway accommodations for the people, and insure their comfort and convenience.”

None of the privileges granted the companies are to be held as implying any relinquishment by the city of its

power to make other requirements or regulations promotive of public safety, comfort or convenience.

Section 2171 of The Code of 1911 provides in part that:

“at any point where any line of any street railway owned, leased or operated by any person or corporation does now or shall hereafter, within the city, join, connect with, cross, intersect or come within a distance of two hundred feet of any other line of street railway owned, leased or operated by the same person or corporation, any passenger who shall have paid his fare on any street car or other vehicle run or operated on such first mentioned line shall be entitled to demand and receive from the person or persons in charge of such street car or other vehicle upon which he has so paid his fare, a transfer ticket, which transfer ticket shall entitle such passenger, without further charge, to be carried on any other one line adjoining, connecting crossing and intersecting, as aforesaid, and owned, leased or operated by such person or corporation, for a continuous trip of any distance within the city, if used within one hour after the same is issued, at the point or place for which such transfer ticket was issued.”

This provision of the Code has been amended by an ordinance of May 20, 1912, in particulars which do not affect the present situation. The last mentioned ordinance is one passed under the police power of the city with a view to promote the comfort, welfare and convenience of the public, and any provision in any contract ordinance which attempted to surrender any such police power would be inoperative. In cases too numerous to mention, it has been uniformly held that the power of the City Council to promote general health and comfort by regulatory measure is one which cannot be traded and bartered away, and is one which must remain ever inviolate and capable of renewed exercise when the public convenience demands. Any limitations, therefore, which the ordinances of 1907 or 1913 may contain upon this police provision of the general code will have to yield, and this more particularly because of the fact that, by the 1907 ordinances themselves, the continuing right to exercise the police power is expressly reserved to the city.

The code provision, then, requires a transfer to be given at any point where any line of street railway owned by a cor-

poration joins, connects, crosses, intersects or comes within a distance of 200 feet of any other line of street railway owned by the same corporation, and any passenger who has paid his fare on the street car run on the first mentioned line shall be entitled to receive, from the person in charge of the street car upon which he has paid his fare, a transfer entitling him to be carried, on any other line connecting, joining, crossing or intersecting and owned by such corporation, for a continuous trip.

There can be no doubt in my mind, that the so-called local lines running north on Halsted street from points south of 79th street join, connect with, and come within a distance of 200 feet of through route No. 8 at both Halsted street and 79th street, and also at such point or points at which these local lines terminate north of 79th street. In other words, there are two connecting and joining points: one at 79th street and Halsted street, which is the terminus of through route No. 8, and the other at such points north of 79th street at which local lines terminate.

Under the plain language of the code, I am of the opinion that transfers can be enforced by the city for the convenience of passengers at both these points as the exigencies of the particular cases and the general accommodation of the traveling public at these points require.

Yours respectfully,

JOHN W. BECKWITH,
1st Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 6, 1914.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You referred to this department a number of letters relating to a complaint made by the Chicago Street Auto and Cab Owners' and Drivers' Protective Association.

The matters laid before you by this association cover a number of things, but your letter asks for information only as to the law concerning the rights of cabmen on the streets

at night and as to the decision of the Municipal Court judge on the point at issue.

It is stated that under the ordinances licensed public cabs have the right to stand anywhere on the streets at night between 6:30 p. m. and 6:30 a. m., except on State street.

With the reservation that the mayor or the general superintendent of police may restrict this right temporarily at all places in case of need and permanently at such places where the privilege interferes with general traffic, and the further reservation that such vehicles are not entitled to stand anywhere in such a way as to obstruct the entrance to any building, structure or place, the above statement is correct.

Section 2582 of The Chicago Code of 1911 provides, among other things, that such vehicles may stand "on all streets except State street, between the hours of 6:30 o'clock p. m. and 6:30 o'clock a. m. each night." This provision is modified by the clause which immediately follows it, which reads as follows:

"No cab, hack or other vehicle entitled to use such stands or streets shall be permitted to stand anywhere thereon in such manner as to obstruct the entrance to any building, structure or place."

For the purpose of preserving order and preventing obstructions the mayor or the chief of police may issue an executive order limiting the rights of public vehicles in the streets still further if such a course is reasonably necessary.

This authority is vested in the mayor both by statute and by ordinance. The general power delegated by statute to the mayor as the chief peace officer of the city is sufficient to meet the situation, but, aside from this, express authority is given by the ordinances.

Section 2439 of the Code gives the mayor or any alderman or police officer the right, whenever a street or alley is obstructed, to "give such directions in regard to the movement of pedestrians, vehicles and street cars as may be required by public convenience."

Section 2494 prohibits any vehicle from remaining on or driving through any street so as to blockade or obstruct traffic.

Section 1938 requires public hackmen to obey the direc-

tions of police officers stationed at any public place to preserve order, and Section 2497 gives police officers discretion to waive the rules of the road in an emergency so as to prevent accident, blockade or the impeding of traffic.

Other sections of the Code might be cited as tending to support the general power of the mayor and the police to preserve order by regulating traffic aside from the strict rules laid down by ordinance, but we believe the sections mentioned above are sufficient to indicate the intention of the City Council to place in the hands of the mayor authority to exercise his discretion in regard to permanently keeping vehicles away from any particular spot where they are likely to impede traffic and temporarily from any place where there is likely to be a temporary obstruction or blockade.

We understand that the order issued contemplated that no automobile cabs of any kind were to be permitted to stand at night on La Salle street between Washington and Madison streets. It may be that this order is beyond the reasonable necessities of the case, and that it might be so regarded if a test were made. But under the powers outlined above, we believe it would be entirely proper to issue an order excluding such vehicles from a more limited area, in view of the fact that the hostelry in question is a large one where social functions frequently take place and where it is not unusual for large numbers of vehicles to congregate to serve the guests on such occasions. At least a reasonable distance on each side of the entrance could be kept open under the clause of Section 2582 which we above quote. Just how much space is necessary is a matter which comes peculiarly within your discretion.

The other point on which you desired information was concerning the decision of Judge Bowles as to the right of police officers to arrest cab drivers standing in front of the La Salle Hotel.

The case of *City v. Henry Wagner* was tried before Judge Bowles in one of the criminal branches of the Municipal Court recently. The defendant was arrested for disorderly conduct, under Section 2012 of the Code. It seems he was ordered away from before the La Salle Hotel, where his cab was standing, by the police officer, and refused to go, and

was therefore prosecuted. The case was tried before a jury, and at the close of the evidence for the prosecution Judge Bowles instructed the jury that under Section 2582 the defendant had a right to stand on the street at that point at night and that he was entitled to a discharge.

We are informed that the court was advised both as to the order issued to keep La Salle street clear and as to Section 1938, which gives the police power to order a cabman away from a public place; and we therefore assume that in the opinion of the judge the order to keep the street clear was of no legal effect.

We return herewith four letters which you forwarded to us in connection with this matter.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 8, 1914.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your letter, in which you inquire whether it would be necessary to have legislative action in order to relieve the Mayor from the necessity of signing bonds and other routine matters, or whether action could be taken by the City Council to accomplish this result, was referred to the undersigned for consideration and reply.

With regard to bonds, there appears to be no reason why the City Council cannot take such action as it sees fit, and provide for the signing of same otherwise than by the Mayor. There is nothing in the statutes which prescribes any particular form or requires the signature of any particular officer. On the other hand, under the 5th clause of Section 1, Article V, of the Cities and Villages Act, the City Council is given authority to borrow money and issue bonds therefor "in such amounts and form, and on such conditions as it shall prescribe."

In the absence of any ordinance covering the subject, the form may be prescribed in each bond ordinance, and the signatures of such officers as the City Council may name may be placed thereon.

The City Council also has it in its power to relieve the Mayor of the necessity of signing licenses and permits as now required by Section 4 of the Chicago Code of 1911. Section 55 of the Code, which requires that all special assessment bonds shall be signed by the Mayor, could also be altered by the City Council without recourse to the legislature.

With regard to warrants drawn upon the Treasurer, the statute (Section 11, Article VII of Cities and Villages Act) makes it obligatory on the Mayor to sign same, and therefore this work could not be assigned to any other official except by a change in the State law. The same section also requires such warrants to be countersigned by the Clerk, which, in the case of the City of Chicago, means the City Comptroller. The City Council by Section 53 of the Code has authorized the Deputy Comptroller to sign such warrants in place of the Comptroller, but it is doubtful whether this provision of the Code would stand if it were attacked, in view of the language used in the statute, which is as follows:

“§11. All warrants drawn upon the treasurer must be signed by the mayor and countersigned by the clerk, stating the particular fund or appropriation to which the same is chargeable, and the person to whom payable; and no money shall be otherwise paid than upon such warrants so drawn, except as hereinafter provided.”

As to all other routine matters, the City Council undoubtedly has power to designate the officer who shall sign instruments binding the city.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

JULY 14, 1914.

HON. CARTER H. HARRISON, Mayor.

Dear Sir :

You have asked to be advised on two points relating to jurisdiction over Grant Park, which is now under the control of the South Park Commissioners.

The first question you ask is whether it would be possible, from a legal standpoint, to have the South Park Commissioners return Grant Park to the city by surrendering their jurisdiction and then for the city to turn over again to the South Park Commissioners jurisdiction over the surface only. Such a procedure necessarily contemplates that some portion of same beneath the surface would be used for other than park purposes.

We are of the opinion that some such plan could be legally carried out, although it occurs to us that, owing to the difficulties that might arise in construing a "surface" jurisdiction, it might be a safer plan to grant jurisdiction and control of the park to the Park Commissioners with certain reservations concerning the use of the land below the surface. Otherwise the city might find itself unable to pursue its plans for improvements beneath the surface on account of the "drop of blood" that would have to be taken when the surface was disturbed.

There has been so much litigation and legislation concerning this tract of land that it is more difficult to say what can be done with it than it is to say what cannot be done. Thus, while it is settled that no buildings can be erected there, it may require further litigation to determine whether or not certain contemplated improvements may be put in under the surface. But in spite of conflicting grants and prohibitive court orders, it seems quite clear that the title still remains in the city, in trust for the people, and that there is no such restriction on the use of the land as to make it impossible to construct public improvements on the surface and underneath which are not strictly speaking for park purposes. The ground was not dedicated specifically for a park, but that such use was intended may be fairly inferred from the manner in which it was dedicated, and this was followed up by

declarations of both the legislature and the City Council making the same a park. It cannot now be regarded in any other light.

It is only where the dedication of the property as public ground is an *unrestricted* dedication to public use that the city or legislature may designate the uses to which it shall be put.

C., R. I. & P. R. R. Co. v. City of Joliet, 79 Ill. 25.

In the present instance that portion of the park lying between Madison and Randolph streets was originally used by the United States government as a part of the military post established there. When the "Fort Dearborn Addition" was subdivided it was marked "Public ground forever to remain vacant of buildings." The certificate of the Secretary of War, written on the margin of the plat, contains the words: "The public ground between Randolph and Madison streets, and fronting upon Lake Michigan, is not to be occupied with buildings of any description." That portion lying between Madison street and Park Row was platted by the Commissioners of the Illinois and Michigan Canal, and was marked "Open ground—no building." The courts have held that this amounted to a dedication for public purposes. (*Godfrey v. City of Alton*, 12 Ill. 29; *Marcy v. Taylor*, 19 Ill. 634; *Maywood Co. v. Village of Maywood*, 118 Ill. 61.) The city accepted the ground thus dedicated, subject to these restrictions:

"These open lands fronting on Lake Michigan, as we have seen, had been dedicated as public ground to be kept free from buildings, and both the city and the State, by their respective legislative bodies, had declared them to be a public park to be kept open and vacant and free from encroachments."

City of Chicago v. Ward, 169 Ill. 392-415.

In the same decision, the court held that the title in the city was established by the Supreme Court of the United States in the case of *Ill. Cent. R. R. Co. v. Illinois*, 146 U. S. 387, and intimates very strongly that certain acts of the legislature passed prior thereto were of no force in impressing the trust imposed on the city in relation thereto, and that this trust resulted from the dedication and acceptance and the acts of the City Council. The court said: "No new trust

was created by these statutes. They merely ordained as law what was already the law in reference to Lake Park." (P. 409.) Again, in *Bliss v. Ward*, 198 Ill. 104, the court held that certain later acts of the legislature had the effect merely to show that the legislature assented to certain things that the city did. This is somewhat inconsistent with language used in *Ward v. Field Museum*, 241 Ill. 496, by the same court, which says, on page 508:

"Where a park has been dedicated for a particular purpose, the municipality having it in charge cannot divert it from that purpose. (*Village of Riverside v. McLain* 210 Ill. 308.) And in *City of Chicago v. Ward*, *supra*, the court held that it was beyond the power of the legislature to change the legal result of the acts of dedication. The city and the South Park Commissioners are creatures of the legislature for the purposes of administering certain functions of local government within specified territory. (*People v. Walsh*, 96 Ill. 232; *West Chicago Park Comrs. v. City of Chicago*, 152 *id.* 392.) 'The City of Chicago, to the extent of the jurisdiction delegated to it by its charter, is but an effluence from the sovereignty of Illinois, governs for Illinois, and its authorized legislation and local administration of law are legislation and local administration by Illinois through the agency of that municipality.' (*Bryne v. Chicago General Railway Co.*, 169 Ill. 75, on p. 85.) The city held, and the park commissioners now hold, the park in the exercise of governmental powers in trust for the public. Such corporations, being purely of legislative creation for local government, the legislature may control and dispose of their property as shall appear to be best for the public. The legislature may create, annul and change municipal corporations and control and dispose of their property, subject only to the constitutional provision relating to local or special legislation. Subject to that condition they may be changed, modified, enlarged, restrained or abolished to suit the exigencies of the case, and the powers and duties with which they are invested may be imposed upon others."

Ward v. Field Museum, 241 Ill. 496-508.

We call attention to these decisions for the purpose of showing that the Supreme Court seems to regard the land as reserved for park purposes, and seems to hold that it was the manner of the acceptance of the city and its actions in regard

to declaring it a park that give it this character, rather than the acts of the legislature.

The legislature undertook several times to declare the land in question a park and to grant jurisdiction to the South Park Commissioners. The principal legislation on this subject is contained in the Act of 1899, as amended in 1901, and the Act of 1903. Both of these acts were passed on the theory that the state could control the disposition of the tract. The Act of 1899 is so badly drawn that it is not necessary to take it into account. The Act of 1903, while in good form, would probably be regarded as beyond the power of the legislature because it undertakes to convey something which does not belong to the state, but to the City of Chicago.

We are therefore of the opinion that the rights of the South Park Commissioners depend on the various ordinances of the city giving that body control and supervision. The two ordinances which accomplish this are the ordinance of July 27, 1896, as amended (see Special Ordinances, pp. 254-258) and the ordinance of July 20, 1903. (Council Journal, pp. 936-7.)

Since these two ordinances do not vest the fee in the South Park Commissioners, the concurrent acts of the two municipalities may be undone by their concurrent acts at the present time. By appropriate action of the City Council, accepted by the South Park Commissioners, the control of Lake Park may again pass to the City of Chicago, subject, it is true, to the trust imposed on the city to keep the same open and to use it as a park so far as the city by its own acts has declared that the same shall be used in that way. In other words, there would be no alienation of property, and the question of how far the park board may go in disposing of its property does not enter into the matter.

As to the uses to which the property may be put, we have already shown that there was no prohibition in the original dedication except as to keeping same open, and the subsequent acts of the city cannot be said to preclude its use for purposes not inconsistent with its use and improvement as a park. On this point we quote the following from the syllabus in *Codman v. Crocker*, 203 Mass. 146, involving the use of a part of Boston Common for purposes of a subway:

Boston Common was dedicated by its owners and was set apart by the town in 1634 "for the common use of the inhabitants of Boston as a training field and cow pasture." It long has been settled that the legal title to the property vested in the town of Boston as a municipality, for the public uses referred to in the language quoted, and the City of Boston now holds the land for these public uses. The inhabitants are to use it in common for such purposes as require that it shall be accessible to all as a common to be enjoyed by the public, the two ways specified in the dedication being only typical as representing the common uses for which there was occasion at that time.

Except in the exercise of the right of eminent domain, Boston Common could not be appropriated to a public use inconsistent with the general character of the use for which it originally was dedicated and set apart, and it is possible that there has been such an acceptance of the dedication of the original donors by the town and city of Boston and by the legislature under different statutes as to amount in this respect to a public trust and deprive the public authorities of the right of eminent domain, which otherwise they would have, to devote the property to a public use of an entirely different kind.

St. 1906, c. 520, in authorizing the construction of a tunnel under a part of Boston Common to the subway station near Park street in such a way that the occupation of the Common above the surface hardly will be changed perceptibly, and increasing the facilities for approaching the Common, does not authorize any use of the Common inconsistent with the purposes of its original dedication.

Codman v. Crocker, 203 Mass. 146.

The above and other authorities which might be quoted indicate that the land on which Grant Park is situated may certainly be used for public purposes not inconsistent with its use as a park, and may be improved underneath the surface with such public works as do not interfere with its use as a park even if such improvements do not constitute a part of the park improvements.

Your second question relates to whether the city, in case of the refusal of the South Park Commissioners to concur

in the plan suggested, could render invalid the two ordinances giving the Park Commissioners jurisdiction over Grant Park.

There does not appear to be any way in which the city can take back control of the property in question without the consent of the park commissioners. There are many features about the jurisdiction of the park commissioners which places it on a different status from that of a private corporation obtaining a grant from the City Council and renders their tenure more secure. These cannot be gone into in detail without extending this opinion to great length. We might mention, however, that the legislative sanction of the acts of the City Council and the acquiescence of all parties amounting to practically a contemporaneous construction of same, constitutes one reason why the grant in this instance rests on even a firmer foundation than a grant to a private corporation. But even if we brush aside these features of the case we still have before us what amounts to a contract that cannot be annulled. The South Park Commissioners spent a great deal of money in furtherance of the grant (if we regard it in the light of a grant), and the same cannot now be revoked.

In the case of *Barney v. Commrs. of Lincoln Park*, 203 Ill. 397, it was held that where a private party made an agreement with park commissioners authorizing them to take possession of land for park purposes there is a permanent interest vested in the latter which cannot be taken back except by showing an abandonment or diversion of the contemplated use.

In the case of *City of Chicago v. P. C. C. & St. L. Ry. Co.*, 242 Ill. 30, it was held that where a city, by ordinance, consents that a park board shall take jurisdiction of a street leading to a park and the park board accepts the provisions of the ordinance and proceeds to improve the street, the city loses jurisdiction over such street for the purposes of improvement and repair. The same principle controls the turning over of a park.

We believe, therefore, that unless consent of the South Park Commissioners is obtained the city cannot now take away any part of their jurisdiction over Grant Park.

It does not necessarily follow, however, that the city

will be prevented from making any and every kind of improvement below the surface of Grant Park in case the necessity arises therefor and the improvement does not interfere with the use of the land for park purposes. Just how far it can go will depend altogether on the urgency of the case, and each improvement contemplated would have to stand on its own merits. No general rule could be formulated that would furnish a safe guide in case such a contingency should arise.

Very respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,

Corporation Counsel.

JULY 17, 1914.

Mr. J. M. WILLARD, Right of Way Agent, Public Service Company of Northern Illinois, 137 South La Salle street, Chicago.

Dear Sir:

Your letter of the 6th inst., addressed to the corporation counsel has been handed the undersigned for reply. You request an opinion of this department as to whether there are any legal objections to the issuing of permits to your company for placing poles in the streets and alleys of what was formerly the Village of Morgan Park, and by the recent election now placed within the boundaries of the City of Chicago.

Since the receipt of your letter at the request of the undersigned, you have submitted to this department the following papers:

(a) Original bill of sale from the Village of Morgan Park to W. P. Martin, dated September 10, 1902, in which bill of sale the Village of Morgan Park transferred to W. P. Martin all the poles "now belonging to the Village of Morgan Park and used for carrying the wires for its electric street lights."

(b) Certified copy of the ordinance granting to W. P. Martin, his heirs, administrators and assigns the right, consent, permission and authority to locate, construct, maintain

and operate the poles, wires and apparatus necessary on, upon, along and across certain streets, alleys, avenues, parks, places and public highways of the Village of Morgan Park, for the purpose of furnishing light, heat, power and signals by means of electricity to the inhabitants of said village.

(c) Original bill of sale from W. P. Martin to Samuel Insull, dated September 10, 1902.

(d) Copy of letter of acceptance of Samuel Insull of the above mentioned ordinance.

(e) Original bill of sale from Samuel Insull to the North Shore Electric Company, dated September 19, 1905.

(f) Original bill of sale from the North Shore Electric Company to the Public Service Company, dated November 11, 1911.

From the original papers submitted to me, I am of the opinion that the bill of sale from the Village of Morgan Park to W. P. Martin, dated September 10, 1902, transferred to said W. P. Martin, his heirs, executors, administrators and assigns, "all the poles now belonging to the Village of Morgan Park and used for carrying its electric street lights * * * subject, however, to the provisions of an ordinance passed by the Board of Trustees of said Village of Morgan Park on September 2, 1902, authorizing the sale of said poles." Excepting the provisions of the ordinance of September 2, 1902, the bill of sale, in my opinion, is sufficient in law to transfer whatever rights are mentioned in said bill of sale. I have examined the ordinance above referred to from certified copy thereof. It appears that said ordinance grants to W. P. Martin, his heirs, administrators and assigns, the right "to erect, construct, operate and maintain the poles, wires and apparatus necessary for furnishing light, heat, power, and signals by means of electricity to the inhabitants of the Village of Morgan Park, on, upon, along and across all the following avenues, streets, alleys, parks, places, roads and public highways in the Village of Morgan Park, to-wit:

Western Ave.	from	Remington Ave.	to	Sada Ave.
107th St.	"	Prospect Ave.	"	Armida Ave.
Walker Ave.	"	Morgan Ave.	"	Park St.
Esmond St.	"	Park St.	"	Meadow St.
Fairfield Ave.	"	Morgan Ave.	"	Weston St.
Morgan Ave.	"	Western Ave.	"	Second St.
Lothair Ave.	"	117th St.	"	Prospect Ave.
Washington Ave.	"	Prospect Ave.	"	107th St.
Sada Ave.	"	Western Ave.	"	Genevra Ave.
Margaret Ave.	"	Genevra Ave.	"	Crescent Ave.
Berkeley Ave.	"	Crescent Ave.	"	Western Ave.
W. Crescent Ave.	"	Arlington Ave.	"	Ebuda St.
E. " " "	"	" " "	"	" " "
Ebuda St.	"	E. Crescent Ave.	"	W. Crescent Ave.
Prospect Ave.	"	107th St.	"	117th St.

The ordinance has many conditions which I do not pass upon in this opinion, nor do I attempt, by this opinion, to in any way construe the said provisions as binding upon the company or the City of Chicago, except as to the question of permits for placing poles on the streets. From an examination of said ordinance, I am of the opinion that W. P. Martin, his heirs, administrators, successors and assigns, have the right to erect poles, wires and apparatus, etc., as above stated, subject, however, to the other conditions mentioned in said ordinance. I further find that the ordinance was properly passed by the said village.

I have also examined the bill of sale, dated September 10, 1902, from said Martin to Samuel Insull and I find that W. P. Martin transferred, and set over to Samuel Insull, his heirs, administrators and assigns, all the rights and privileges which the said W. P. Martin obtained under and by virtue of the ordinance above referred to. From such examination, I am of the opinion that Samuel Insull succeeded Martin in and to the rights granted by said Village of Morgan Park to said Martin.

I further find upon examination of the bill of sale from Samuel Insull to the North Shore Electric Company, dated September 17, 1905, that Samuel Insull transferred to the North Shore Electric Company all his right, title and interest in the said ordinance above referred to, and I am of the opinion that said bill of sale from Samuel Insull to the North Shore Electric Company legally sets over and assigns to said North Shore Electric Company all rights and interest in said

ordinance passed by the Village board of the Village of Morgan Park on September 2, 1902.

I also find by examination of the bill of sale from the North Shore Electric Company, dated November 11, 1911, that the said North Shore Electric Company transferred and set over to the Public Service Company of Northern Illinois, its successors and assigns, all rights, benefits, privileges and advantages granted and conferred by the said aforementioned ordinance. I am further of the opinion that the said Public Service Company of Northern Illinois is now legally entitled to all the rights and benefits under and by virtue of the aforementioned ordinance of September 2, 1902, of the Village of Morgan Park, granting to W. P. Martin, the right to erect, construct, operate and maintain over certain streets of Morgan Park (specifically mentioned in that ordinance) poles for electric light, heat, power, etc.

In conclusion, I wish to say that from examination of these various papers, I am of the opinion that there is no legal objection on the part of the City of Chicago to the granting to said Public Service Company of Northern Illinois, permits to erect poles on, upon, along and across the streets, alleys, parks, places, roads and public highways in that part of the Village of Morgan Park now annexed to the City of Chicago, provided the said poles do not go upon any other places than the specific streets and public ways and places mentioned in said ordinance, and provided further, that permits shall, in all other respects, comply with the ordinances of the City of Chicago relating to the granting of such permits.

I return herewith all the various papers left with me for inspection.

Yours very truly,
 LOUIS SALINGER,
Assistant Corporation Counsel.

Approved:
 BRYAN Y. CRAIG,
Acting Corporation Counsel.

JULY 17, 1914.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:—

You refer to this department an application for a building permit for the construction of an addition more than 200 feet high to the Borland Building, together with a letter from the owner and two pictures showing how the building would appear if the addition is built as contemplated and how it would look if the addition were only 200 feet high.

The determination of the rights of this party involves so close a legal question that we quote in full the various provisions of the Code relating to the subject matter. We also found it desirable to secure an affidavit covering the facts which enter into the disposition of the questions of law which we pass on.

The matter hinges primarily on the construction and application of Paragraph (c) of Section 598 of The Chicago Code of 1911, which was first adopted on February 6, 1911, and which reads as follows:

“(c) No building shall be erected of greater height than two hundred feet from the sidewalk level to the highest point of external bearing walls; provided, however, that buildings may be erected of a height of two hundred sixty feet from the sidewalk level to the highest point of external bearing walls up to and until the first day of September, 1911, where a permit has been secured therefor and the work incident to the erection of said building has been begun before September 1, 1911. The erection of parapet walls or of balustrades constructed entirely of incombustible material shall be permitted above the roof level of buildings of all classes, in addition to the height fixed herein for the same.”

The Borland Building was originally constructed with a frontage of 111 feet on La Salle street extending south from the southeast corner of La Salle and Monroe streets. The building is 242 feet, 5 inches in height, and was built in the years 1905 and 1906. At that time, and until February 6, 1911, buildings up to 260 feet in height could be erected within the city.

About June 1, 1910, and while the 260-foot provision was still in force, the owner acquired the 78 feet on La Salle

street adjoining the Borland Building to the south on which stood the Calumet Building, with the purpose in view of tearing down the old building and erecting an addition to the Borland Building which would be uniform in design and character with the original building and could be operated in conjunction therewith as one building. It also appears that the Calumet Building was, immediately after its acquisition, connected with and made a part of the Borland Building, and that the two buildings were operated together as one administrative unit.

It is claimed on behalf of the owner that because the Calumet Building formed a part of the Borland Building before it was torn down, the reconstruction along the new lines must be regarded as an alteration of an existing building. The first point which arises is whether, since Section 598 (c) is in derogation of common law rights, it must be strictly construed against the municipality and held not to include the making of alterations to a building already in existence.

The principle of law on which this contention is based cannot be controverted. Inasmuch as the ordinance takes away property rights which the owner had before its enactment, its meaning must not be extended so as to include anything by implication. But there are two other sections of the Code which we have to consider in arriving at a conclusion as to whether the section above quoted is to be interpreted as contended for or whether it must be construed liberally to accomplish the object which the City Council had in view. These are Sections 512 and 514 (c), both of which appear below.

We think that there is no doubt whatever that the intention of the Council was to restrict the height of the addition to 200 feet. In attempting to give expression to this intention the Council enacted the said two other sections in which the intention is also clear, one of which supports Section 598 (c), while the other destroys it so far as the addition to this building is concerned.

There is no reason for regarding the building of an addition as an alteration, but in any event the point is immaterial since both are provided for in Section 512, which was passed as a part of the same ordinance at the time the whole

building code was re-enacted in The Chicago Code of 1911, and which, if it stood alone, would effectively dispose of this contention.

But Section 512, which in a measure clears up the first point, furnishes a stumbling-block on the next point raised, as we show later on. It reads as follows:

“512. CONSTRUCTION OR ALTERATION OF BUILDING-REQUIREMENTS.] Every building or structure or part thereof, hereafter constructed, erected, altered, enlarged, repaired or changed within the city shall be so constructed, erected, altered, enlarged, repaired or changed, in accordance with the provisions of this Chapter.”

Having in mind that the two sections above quoted must be read together, from our point of view it makes no difference whether you call this new addition an alteration or an enlargement or a new part of the building. It would stand on precisely the same footing as a new building if it were not for the greater difficulty which arises from the use of the words “or part thereof,” and the word “enlarged.”

This difficulty arises on account of the provisions of Section 514 (c). That section reads as follows:

“(c) If, however, it is desired to enlarge, or in any manner materially modify the construction of any existing building, or to make a change in its use or occupation which will transfer it from one class as recognized by this Chapter to another class, then, before such enlargement or structural change or modification of building is made, or before such change in its use or occupation may be made, written notice shall be given to the Commissioner of Buildings of the intention to change the character of the use, and the entire building shall be reconstructed or modified in such manner as to bring the same, when enlarged or altered, or when occupied for its new and different purposes, into compliance with the provisions of this Chapter.”

The wording used in Section 512 and Section 514 clearly indicates that the Council had in mind a distinction between new buildings and additions to and enlargements of old buildings. This fact, when the rule of strict construction is applied, leads to a serious question of validity and an inconsistency when we come to consider the second point made.

The second contention made on behalf of the owner is

that in case Section 598 applies to such an addition (or alteration as they put it), then paragraph (c) of Section 514 must be construed as requiring the tearing down of part of the Borland Building itself when the new addition is built, and the point is made that if so interpreted both that section and the other sections referred to above are invalid.

We are constrained to say that there is great force in this argument. The ordinance, in the plainest language, says that where it is proposed to enlarge a building "the entire building shall be reconstructed or modified in such manner as to bring the same, when enlarged * * * into compliance with the provisions of this chapter." This necessarily includes the height limitation, and means that if it is to be interpreted as applying to the addition to the Borland Building the present structure must be brought down in height to a maximum of 200 feet.

That the ordinance was not intended to be retroactive is clear from numerous sections in same, and it is particularly so set forth in paragraph (a) of the same section, which reads as follows:

"(a) In construing the several sections of this Chapter, said sections shall not be construed as requiring alterations in the construction or equipment of buildings or structures in existence at the time of the passage of this Chapter, except where specifically provided, unless such buildings shall not have sufficient or adequate means of egress therefrom or ingress thereto, by reason of insufficient or inadequate stairways or stairways improperly located or insufficient or inadequate elevators or elevator equipment, doors, fire escapes, windows or other means of egress or ingress and except also in sections which are herein made retroactive."

Hence, we are met with an inconsistency in the first place, and we are further confronted with the question whether by forcing a literal construction of Section 514 (c) as set forth above, we are not endangering the ordinance. It would be held invalid if the provisions were to be so construed as to be plainly repugnant to the spirit and intent of the whole ordinance, to say nothing about the constitutional question involved if the owner were deprived of property in

this way by an ordinance passed under the police powers of the municipality.

We believe the safe course to pursue is to so interpret the various sections involved, if we can, as to make them consistent with each other and avoid the question of validity. The rule is that where a statute or ordinance can be interpreted in two ways, one of which would render it valid and the other invalid, the interpretation which would give force and effect to same as a valid enactment should be followed. (36 Cyc. 1112.)

Again, if we were to apply the literal meaning of the words used in Section 514 (c) in every case, there are numerous conditions that might arise that would lead to an absurdity. Thus, if a department store building which exceeds the height limit (of which there are several) were to be altered so as to make it an office building, the height would have to be reduced, although the elements of danger are less in the latter class of buildings than in the former. The same is true of a hotel which is changed to an office building. It would prevent the changing of the foundations of tall buildings by the sinking of caissons in place of floating foundations unless the building were reduced in height. Other absurdities could be pointed out.

We believe we are not straining the language of the ordinance when we say that it is fair to infer that the City Council did not intend to make it necessary to reduce the height of any existing building.

Applying the rule of strict construction on the one hand, and the rule of interpretation so as to make the ordinance valid on the other, we believe that all inconsistency would be removed without doing violence to the language used, and the various sections would be rendered harmonious and valid, if we held that the provisions of Section 598 (c) relating to the height of a building do not apply to the enlargement of an existing building in cases where its enforcement and the enforcement of Section 514 (c) would compel the reduction of the height of the portion of same already erected. Or, to put it more plainly, that the words "no building shall be erected of greater height," etc., as used in Section 598 (c)

must be understood to refer to a building as distinguished from a part of a building where the existing portion is above the limitation in height. It should not be construed as permitting an addition to a building more than 200 feet high if such addition does not form with the original building a single structure operated as a unit, nor should it be construed as permitting a building to be carried up beyond the 200 feet through the means of a new addition where the existing building is within the limit, since that would in fact be erecting a building beyond the height limit as distinguished from altering or enlarging it, but where the addition only comes up to the height of the original building, it will have to be regarded as within the law.

Consequently, we are of the opinion that the permit applied for should be granted.

We transmit herewith the application, letter of Mrs. Borland, two pictures, and the affidavit of C. F. Heal.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,

Acting Corporation Counsel.

JULY 31, 1914.

HON. RAY PALMER, Commissioner of Gas and Electricity.

Dear Sir:

Your communication of the 29th inst., relative to interference by property owners with street lamps, in which you ask for an opinion as to the existence of an ordinance covering this subject and as to your power to enforce reasonable rules for the proper maintenance of street lights, has been referred to me for reply.

Section 859 of the Chicago Code of 1911 provides as follows:

“Any person breaking, mutilating or obstructing any of the public lamps in the city, or any street signs attached thereto, shall be fined not more than \$10.00 for each offense.”

Under the foregoing section prosecutions may be main-

tained against anyone interfering with the street lamps of the city.

Under Section 856 of the Chicago Code of 1911, which is as follows,

“The city electrician shall have charge and control of and shall erect all lamp posts and lamps, and street signs designating the names of the streets which shall be placed on said lamps.”

Sufficient authority is given you to permit the adoption of reasonable rules for the proper maintenance of street lights, but there is no specific provision in the Code which provides any effective means for the enforcement of such rules and regulations as might be made by you so far as private persons are concerned.

Very respectfully yours,

LORING R. HOOVER,

Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,

Acting Corporation Counsel.

AUGUST 3, 1914.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

We are in receipt of your letter concerning the proposition made by the President of the Board of County Commissioners of Cook County in regard to the loan of funds of the City on tax anticipation warrants issued by the County, to which was attached the letter of President McCormick of the Board of Commissioners, and your reply thereto.

After studying over the papers we do not believe that anything further can be said in the matter than you have stated in your reply to President McCormick. The proposition made by him is to the effect that the County is willing to pay three per cent. (3%) for funds of the city to be used in this way and to issue tax anticipation warrants for same.

If the City were in a position to let out its funds in this way there is no doubt that it would obtain some advantage by letting the money at a higher rate of interest than it is now receiving from the depositaries, but as stated in your reply

to President McCormick the law does not permit such a thing to be done.

Under the Act of June 5, 1911, the city may use such funds for its own purposes in exchange for tax anticipation warrants issued by the city, but it is powerless to use funds collected for other purposes and lying idle in the banks for even the purchase of its own bonds on which it is paying four per cent. (4%) interest.

It is an anomalous condition to say the least that the city should have large sums of money in banks on which it receives only two and one-quarter per cent. (2¼%) and at the same time be compelled to borrow money at the rate of four per cent. (4%), but the law does not give it the power to do away with this condition. We believe your answer to President McCormick covers the entire subject.

Yours respectfully,

LEON HORNSTEIN,
Acting Corporation Counsel.

AUGUST 15, 1914.

TO THE BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND.
Gentlemen:

Patrick Quinn died on December 25th, 1913, after having served fourteen years in the fire department. On March 11th, 1914, a widow's pension was allowed to Etta Quinn. At the time the application for widow's pension was made, claim was also made for pension for Margaret Quinn, a minor under the age of sixteen years.

It appears that Margaret Quinn was baptized as Josephine Vasel and was taken into the household of Patrick and Etta Quinn during the lifetime of Patrick, on November 9th, 1908, under an agreement with the Foundling Hospital of the Sisters of Charity of the City of New York, whereby the said Patrick and Etta Quinn agreed to provide for Josephine Vasel and to educate her as their own child.

Section 8 of the Firemen's Pension Act provides that, if any member of the department shall die in the service and shall leave a widow, minor child or minor children under sixteen years of age, the board of trustees shall direct the pay-

ment of \$35.00 a month to the widow and \$8.00 a month to the guardian for each minor child until it reaches the age of sixteen years.

The word "child" or "children" would ordinarily mean the natural child or children of the fireman, but by reason of the provisions of the Illinois Adoption Act, any child who is adopted pursuant to that statute is deemed by law the child of the parents by adoption, the same as if it had been born to them in lawful wedlock. (See *Ryan v. Foreman et al.*, 181 Ill. App. 262; affirmed by Supreme Court February 21, 1914.)

Unless, however, the child is adopted by legal process, as is provided in the adoption laws of this State, it is not entitled to the rights of a natural child. There is no record of any adoption of Josephine Vassel by Patrick Quinn during his lifetime. The agreement or intention of the deceased to adopt her is not efficacious. An attempt has been made to remedy the oversight by securing a decree of adoption in favor of Etta E. Quinn, the widow of the deceased, in February, 1914, long after the fireman died. This decree does not remedy the situation any, as by its terms Margaret Josephine Quinn is the legally adopted child of Etta E. Quinn and not the child of the deceased fireman.

For the reasons indicated, we are of the opinion that the minor child is not entitled to a pension.

Very respectfully yours,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

AUGUST 20, 1914.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

In reply to your inquiry concerning the payment by the city of subsequent taxes on property which it has bid in at tax sales in default of other bidders, beg to advise you that the subject in question is controlled by Section 211 of the

Revenue Act, and that while that act imposes upon tax buyers in general, the obligation of paying subsequent taxes, it, by a proviso, exempts municipalities from such payment.

The proviso of the section in question is as follows:

“Provided, however, it shall not be necessary for any municipal corporation which shall bid in its own delinquent special assessments at any sale, in default of any other bidders, to protect the property from subsequent forfeitures or sales as above required in this section.”

We, therefore, advise you that the city is not required to pay subsequent taxes on property which it has purchased at tax foreclosure sales, and we believe that if you call the attention of the county collector to the proviso of the section in question that he will not disagree with our conclusions.

Very truly yours,

CHARLES M. HAFT,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

SEPTEMBER 1, 1914.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

In your letter of recent date you inquire whether you have the right to issue tax anticipation warrants to a somewhat greater extent than has been your practice, and you point out that the statute both as it was before the recent revision and as it was revised at the last session of the legislature authorized you to issue such warrants to the extent of seventy-five per cent. of the tax levy regardless of deductions to be made for sinking fund purposes.

It seems quite clear that under the strict letter of the law the city authorities have the right to disregard tax levies made for purposes of sinking funds when anticipation warrants are issued.

Section 2 of the Act authorizes the proper authorities “to provide a fund to meet all said expenses by issuing and disposing of warrants drawn against and in anticipation of

any taxes already levied by said authorities * * * to the extent of seventy-five per centum of the total amount of any such tax levied."

Under the authority here given the total amount of the tax levy may be taken as the basis for computing the amount of anticipation warrants that may be issued and seventy-five per cent. of same would be legal.

We believe, however, that the legislature did not contemplate that so large an amount of these warrants should be issued that the levy for sinking funds would be impaired. Therefore, while we believe you have the right to issue to a greater extent than you did before, it ought not to be done on the basis of ignoring the question of whether the sinking fund would remain intact. It should rather be done on the theory that you have heretofore restricted yourself more than is contemplated by statute.

In other words, up to the present time you have not taken the actual levy as the basis for computation, but have taken the amount that you estimated as the net revenue to be derived therefrom. You have assumed that the statute authorized you to issue warrants to the extent of only seventy-five per cent. of what you expected to receive rather than seventy-five per cent. of the amount levied.

Under our view of the statute the possible shrinkage due to scaling under the Juul law, loss and cost of collection, etc., is already taken care of when a deduction of twenty-five per cent. from the total is required.

Taking last year's receipts as the basis we find from your figures that the net amount that the city would receive for corporate purposes after deducting the tuberculosis sanitarium tax, the library tax, the sinking fund tax and the Cicero tax is \$12,446,380.42. Applying the rule that you have followed heretofore you would issue anticipation warrants only to the extent of seventy-five per cent. of this sum, thereby giving the city a tax warrant borrowing power of \$9,334,785.32.

We do not believe that you are required to determine your borrowing power on this basis. You clearly have the right under the statute to borrow to the extent of seventy-

five per cent. on \$14,823,112.50, which is the amount levied for corporate purposes after deducting the educational tax, the tuberculosis sanitarium tax, the public library tax and the sinking fund tax. This would give you a borrowing power of \$11,117,334.45, and would still leave the sinking fund levy intact. The last sum mentioned comes well within the amount of the net sum which will be realized on the levy of the city and that is all that the statute aims to provide for. The purpose of the twenty-five per cent. reduction is to make it certain that there will be no deficit and that the tax anticipation warrants are fully covered by the net receipts.

It is, of course, safer and indicates better financiering if you could follow the practice that you have pursued in the past, but we see no reason under the extraordinary circumstances which confront you and the safe conditions that would exist for adhering so strictly to that policy.

You state in your letter that you require additional cash to the extent of about \$750,000.00. So much additional money can be raised by you on the levy made, without in the slightest degree impairing the sinking fund or rendering the security insufficient since it is certain that the amount contemplated will be realized in addition to the seventy-five per cent. of the estimated receipts.

In this connection it has been suggested that you could retire some of these anticipation warrants by using moneys collected otherwise than from taxes. We are convinced that if this were done no objection could be raised, even though the statute says expressly that "warrants drawn and issued under the provisions of this section shall show upon their face that they are payable solely from said taxes when collected and not otherwise."

We infer from the language used that this provision was intended on the one hand to protect the city against demands being made upon such warrants before they are due, and on the other hand to protect the holder thereof and assure him that he will realize the face value of same.

Nevertheless we would not recommend that such payment be made out of miscellaneous receipts. It would be the better part of wisdom to avoid any question as to the applica-

tion of funds by allowing these anticipation warrants to stand until the taxes are collected. The proper disposition of the moneys received from miscellaneous sources and from taxes could not, in such event, be successfully assailed.

Very truly yours,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JOHN W. BECKWITH,
Acting Corporation Counsel.

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 8, 1914.

HON. OTTO KERNER, Chairman, Committee on Judiciary of
the City Council of the City of Chicago.

Dear Sir:

At a special meeting of the city council held August 24, 1914, the following order was passed:

“BE IT ORDERED, that the corporation counsel furnish to the committee on judiciary at the earliest possible moment an opinion as to the powers of the council in the passage of an ordinance or ordinances for the purpose of reducing the high cost of clothing and other similar commodities.”

Council Journal, page 1404.

It is an elementary principle in the construction and application of municipal laws that the city can exercise only such powers as are granted to it by the legislative authority of the State, and those powers necessarily arising through the grant of the powers expressly conferred.

The fiftieth clause of Article V, chapter 24, Hurd's Revised Statutes, confers upon the city the power

“to regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same.”

By the enumeration of specific subjects or articles of food in this clause those not enumerated are expressly excluded from the regulatory provisions of this clause, and consequently this clause cannot be extended to cover the sale of clothing and similar commodities.

This clause of the statute above referred to has been discussed by the Supreme Court of this state in the case of *City of Chicago v. Netcher*, 183 Ill. 104, the court therein, denying the right of the city to prohibit the sale of meats, fish, etc., by any person engaged in the dry goods or clothing business, say :

“When an owner is deprived of the right to expose for sale and sell his property he is deprived of property, within the meaning of the constitution, by taking away one of the incidents of ownership. * * * The individual may pursue, without let or hinderance from any one, all such callings or pursuits as are innocent in themselves and not injurious to the public. These are fundamental rights of every person living under this government. The legislature can neither by an enactment of its own interfere with such rights, nor authorize a municipal corporation to do so. *Frorer v. People*, 141 Ill. 171; *Ramsey v. People*, 142 *id.* 380; *Braceville Coal Co. v. People*, 147 *id.* 66; *Cooley’s Const. Lim.* 393.”

The only other statutory provision which is to be found in this line is the fifty-first clause which invests the city council with power

“to prevent and punish forestalling and regrating,”

These terms imply the buying or contracting for any merchandise or victual on its way to market, or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the price when there, any of which practices make the market dearer to the trader, and also buying necessities after they reach the market with intent to resell in the same market at an enhanced price. (Amer. & Eng. Ency. of Law, Vol. 13, p. 1072; *id.* Vol. 27, p. 891.)

Regrating and forestalling laws, although of great antiquity, have ordinarily been applied to such commodities as foodstuffs, and it is at least an open question whether clause 51 of Article V, chapter 24, above quoted, does not apply solely to articles of food. However, it is unnecessary to debate this question as the resolution of the council does not refer to the punishing of combinations for the purposes of enhancing the price of clothing and similar commodities, but is aimed at “reducing the high cost of clothing and other similar commodities.” In a general way, it may be said that the

price of clothing and similar commodities is regulated by the law of supply and demand, and in the absence of an adequate supply to meet an unusual demand, prices will rise. This economic proposition can scarcely be controverted, yet at the same time there is no question that artificial prices for clothing may be produced and maintained through illegal combination and monopoly. The city charter, however, is wanting in any power conferred upon it by the legislature to reduce the present high cost of clothing.

The business of manufacture and sale of clothing and similar commodities is a private business and is not subject to regulation by the city council without express legislative authority, which in the present instance is lacking. A private business differs materially in legal contemplation from one impressed with a public interest. In speaking of the business of mining coal and how far such business was affected by the public interest, the Supreme Court of this State in *Millett v. People*, 117 Ill. 294, 303, say:

“It cannot be claimed that mining for coal was, by the common law, affected with a public use, and therefore specially regulated by law, like the business of innkeepers, common carriers, millers, etc., and, in our opinion, it is not, like the business of public warehousing, within the principle controlling such classes of business. The public are not compelled to resort to mine owners any more than they are compelled to resort to the owners of wood, or turf, or even to the owners of grain, domestic animals, *or to those owning any of the other ordinary necessities or conveniences of life which form a part of the commerce of the country.*”

As to the question, therefore, as to whether a legal ordinance or ordinances can be passed for reducing the high cost of clothing and other similar commodities, I am constrained to answer the inquiry in the negative.

Yours respectfully,

JOHN W. BECKWITH,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 8, 1914.

HON. M. FERRY, Commissioner of Public Service, City of Chicago.

Dear Sir:

We are in receipt of your communication of September 1st, in regard to deposits required by the Peoples Gas Light & Coke Company to secure the payment for gas to be consumed.

You inquire first as to the meaning and application of Section 1038 of the Chicago Code of 1911, which reads as follows:

“1038. No DEPOSIT FOR METERS.] It shall be unlawful for any person or corporation engaged in the business of furnishing or supplying gas for consumption in the city to acquire, demand, or receive a deposit of money or other valuable thing as a condition precedent to or as a security for furnishing any consumer with a meter.”

We are of the opinion that said Section 1038 relates only to the matter of the requiring of a deposit as security for furnishing a meter. It does not purport to forbid or make unlawful the requiring of a deposit to secure the payment for gas to be consumed.

That public service corporations may adopt and enforce reasonable rules and regulations, not inconsistent with the laws of the State, for the conduct of their business is settled by the authorities.

A rule of a gas company requiring security or a deposit of money to secure payment for gas to be furnished has been held to be reasonable in the following, among other, cases:

Phelan v. Boone Gas Co., 147 Ia. 626; 31 L. R. A. (N. S.) 319;

Cedar Rapids Gas Light Co. v. Cedar Rapids, 144 Ia. 426.

Shepard v. Milwaukee Gaslight Co., 6 Wis. 539.

Williams v. Mutual Gas Co., 52 Mich. 499.

Vanderberg v. Kansas City Gas Co., 126 Mo. App. 600.

See also:

McQuillin Mun. Corp., Secs. 1711, 1712, 1690.

Dillon Mun. Corp., 5th Ed., Sec. 1319.

Huston v. City Gas & Elec. Co., 158 Ill. App. 307.

In the case of *Shepard v. Milwaukee Gas Co.*, *supra*, the court, in discussing a rule of the company requiring a deposit, said:

“The 3rd rule of the company, allowing the company to demand security for the gas consumed, or a deposit of money to secure payment thereof, appears to be just, and necessary to guard against loss. As the delivery of the gas is necessarily its consumption, and as the amount delivered is ascertained by the amount consumed, it would seem to be just and right that the company should not be compelled to furnish it without reasonable security for payment, in convenient amounts and at proper periods.”

In the case of *Phelan v. Boone Gas Co.*, *supra*, the court, speaking of a custom of the defendant to require a deposit or the contract to be signed by some responsible party when the applicant for gas was unknown or was deemed not to be responsible, said:

“The company is bound to furnish on application, and it is but just that it be not compelled to supply unknown or irresponsible persons therewith, without assurance in some form that it will receive compensation.”

The act of the General Assembly, approved May 29, 1879, Hurd's R. S. of Ill., 1911, p. 1407, entitled “An Act to compel gas companies to pay interest on deposits made by parties at the request of such companies,” seems to recognize that a rule of a gas company requiring a deposit to secure payment for gas to be furnished would be a reasonable regulation.

The New York transportation corporation law (1890) provides that a gas company may require every person to whom it shall supply gas to deposit a reasonable sum of money according to the quantity of gas necessary to supply the number and size of lights proposed to be used for two calendar months .

See *Pollits v. Consol. Gas Co.*, 102 N. Y. Supp. 1017.

Of course the rules and regulations of a public service company must be reasonable and not capricious, arbitrary or oppressive, and consequently the amount of the deposit required by the company must be reasonable. It is not necessary that the company require a deposit from every person using gas. In *Phelan v. Boone Gas Co.*, *supra*, it appears that

the custom of the company was to require a deposit or the contract with the company to be signed by some responsible person when the applicant was unknown or was deemed not to be a responsible person.

In view of the foregoing, we are of the opinion that the gas company has the right to make and enforce a rule requiring a reasonable amount to be deposited with it to secure the payment for gas to be furnished by it to the applicant.

Yours very truly,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 10, 1914.

HON. M. FERRY, Commissioner of Public Service.

Dear Sir:

We are in receipt of your communication of August 26th, inquiring what, if anything, can be done by the City of Chicago to compel the Commonwealth Edison Company to extend its street mains where service is desired which can not be furnished without an extension of such mains.

Any power on the part of the city to require the company to extend its street mains would have to be found in the ordinance or ordinances under which the company is operating. The Commonwealth Edison Company is operating under the ordinance granted June 28, 1897 to the Commonwealth Electric Company, which company and the Chicago Edison Company were consolidated into the Commonwealth Edison Company, and also the ordinances passed March 23, 1908 and November 26, 1913 for the purpose of fixing the maximum rates to be charged by the Commonwealth Edison Company and for other purposes appearing in said ordinances.

Section 8 of the aforesaid ordinance of June 28, 1897, provides that the grantee company shall, within three years from the passage of said ordinance, erect, construct and have ready for operation a plant or plants and in connection therewith have constructed underground conduits or erected poles

and strung wires thereon, or both, the actual *bona fide* cost of all of which shall be \$100,000.

This is the only provision that we find in any of the ordinances mentioned requiring the construction of plant or the installation of wires.

We are, therefore, of the opinion that the City has no power to require the Commonwealth Edison Company to make extensions of its street mains.

Yours very truly,

BRYAN Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 18, 1914.

HON. JOHN E. TRAEGER, City Comptroller.

Dear Sir:

Replying to your inquiry of March 4 relative to the account to which the street car companies should charge the amount which they pay on account of the Federal income tax on interest coupons attached to bonds issued by them, we beg to advise you that it is our opinion that such expenditures should be charged to the companies' 45% of the net receipts.

We beg to advise you further that interest received from the city on judgments against it is not subject to the Federal income tax.

Yours truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 21, 1914.

MR. W. O. COLEMAN, President, Burley & Tyrrell Co., 7 N. Wabash Ave., Chicago, Illinois.

Dear Sir:

I have examined the form of contract for Auxiliary or Break-Down Service at your premises, 1910 to 1920 W.

Kinzie street, tendered to you by the Commonwealth Edison Company. You state that you would desire three months' service and object to the provision of the contract providing that the contract term shall be not less than one year.

The maximum rates which may lawfully be charged by the company are fixed in its ordinance of November 26, 1913. Said ordinance fixes the rates for various classes of service, but does not specify the time for which the contracts therefore, shall run.

Public service companies may lawfully insert in their contracts reasonable provisions not in conflict with the ordinances under which they operate, or with the laws of the state. The Commonwealth Edison Company incurs expenses for making connections with the premises of its patrons, furnishing meters, etc., and in maintaining plant and equipment to meet the demand which it obligates itself to furnish.

Under these conditions, it is not, in my opinion, unreasonable for the company to require its contract to furnish service to be for a reasonable period. The ordinance of the Chicago Telephone Company recognizing this principle, expressly provides that the service shall be furnished "under yearly contracts payable monthly," and all contracts for telephone service are made for not less than a year.

The Commonwealth Edison Company's contract Rate A for general service is not for a fixed term, but continues until written notice by either party. Contracts Rate B for regular power service of various kinds, continue for a fixed term of one year and thereafter, until written notice by either party. Contracts Rate C for large light and power service of various kinds, continue for a fixed term of five years and thereafter, until written notice by either party. Contracts Rate D for sign lighting, etc., continue for twenty-four consecutive months and thereafter, until written notice by either party. Contracts Rate E, flat rate lighting service of various kinds, continue for a fixed term of 104 consecutive weeks.

The Electric Bureau of the City's Public Service Department has informed me that in power service contract, breakdown service, such as has been tendered you and the other kinds of service, for which the contracts provide for a fixed term, the demand for the fixed term comes in most cases

from the applicants who want to be assured of service for a definite time at a fixed rate before purchasing and installing motors, or other equipment, and that the "term period" in each class of service is worked out on a supposedly scientific basis, having in view the averaged wishes of the applicants, the cost to the company of making the connections and other factors.

I am of the opinion that the Commonwealth Edison Company can lawfully insist on a contract for service being for a fixed term of reasonable duration; that the term should be uniform for all users of a given service and should be based upon the "averaged" conditions obtaining among the users of the given service as a class, and that the company could not be compelled to enter into a contract for breakdown service, for a contract term of less than one year, unless it could be shown that the period of one year fixed by the company as the minimum contract term for such service is unreasonable as applied to the users of such service as a class.

Yours very truly,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 22, 1914.

HON. M. FERRY, Commissioner of Public Service, City of Chicago.

Dear Sir:

We are in receipt of your communication of the 11th inst., in regard to the threatened discontinuance of service of the Commonwealth Edison Company to the Nusser-Stowe Company, and also copy of letter to you from the Commonwealth Edison Company with reference to the matter in question from which it appears that said Nusser-Stowe Company has two contracts with the Commonwealth Edison Company for electrical service at its premises at 3400 Southport avenue; that one of these contracts is for interior lighting and that there has been no default in the payment of bills

under this contract; that the other contract is for maintaining and lighting a lamp-post in front of the premises and that the Nusser-Stowe Company is behind in its payment of bills under this last mentioned contract.

The Commonwealth Edison Company in common with other public service companies has the right to adopt and enforce reasonable rules and regulations for the conduct of its business, not inconsistent with the provisions of the ordinance or ordinances under which it is operating, or with the laws of the State.

That a public service company may adopt and enforce a rule requiring security or a deposit of money to secure payment for service to be furnished is established by the authorities. (See our opinion to you of September 8, 1914, re-deposits required by the Peoples Gas Light & Coke Company.)

The general rule in respect to a public service company compelling payments of an amount due at other premises or of independent claims, as a condition to the continuance of service, is stated thus in McQuillin on Mun. Corp., Sec. 1691:

“The general rule is that a patron cannot be refused a supply or service because of his unpaid bills at other premises, or his failure to pay past due rents for some other and independent use, or amounts due on a separate and distinct transaction from that for which he is claiming and demanding a supply.”

In the case of *Danaher v. Southwestern Teleg. & Teleph. Co.*, 127 S. W. 963; 30 L. R. A. (N. S.) 1027, the Supreme Court of Arkansas, in March, 1910, held that a telephone company, being a public service corporation, could not refuse to serve one until he pays the company a debt contracted for services rendered in the past. A holding to the same effect is found in the case of *Southwestern Teleg. & Teleph. Co. v. Luckett*, (Tex. Civ. App.) 127 S. W. 826.

While we have not been able to find a case presenting precisely the same circumstances as the case referred to in your communication, we are inclined to the opinion that the fact that a person is in default on an independent contract for lighting a lamp outside of his premises, will not warrant the public service company in refusing to carry out its contract with the same person for interior lighting, he not being

in default on the latter contract. If the company doubts its patron's willingness or ability to pay for light to be furnished on the interior lighting contract, it may enforce its rule in regard to a deposit to secure such payment.

Yours very truly,

BYRON Y. CRAIG,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 23, 1914.

HON. WALTER G. LEININGER, Superintendent of Streets.

Dear Sir:

We are in receipt of your communication of the 18th instant asking to be advised as to what action to take to compel the removal of poles of the Chicago Telephone Company, the Illinois Tunnel Company and the Commonwealth Edison Company from the alleys in the block bounded by Thirty-eighth and Thirty-ninth streets, Calumet and Forest avenues.

We understand from the property owners' petition accompanying your communication that the alleys in question are about to be paved with a concrete and brick pavement.

Section 11 of The Chicago Telephone Company Ordinance, passed November 6, 1907, is in part as follows:

“Any poles, cables or wires, or any line or lines of poles, cables or wires now standing, or hereafter erected in any street, alley or public way within the City of Chicago, shall be removed from said street, alley or public way, and said wires or cables placed under ground therein, in advance of paving or repaving, upon the order of the Commissioner of Public Works. Whenever in such case in the judgment of the Commissioner of Public Works it shall be for the interest of the City of Chicago that such overhead wires or cables, or any line or lines of cables or wires, or any of them, shall be placed under ground, he shall so order it, and upon a receipt of such order by the Chicago Telephone Company, or its successors, or assigns, said Company, or such successors, or assigns, shall without delay place under ground the wires or cables as ordered. Should said Company fail to place any wires or cables under ground as provided in

this ordinance then the Department of Public Works shall have the right (at the expense of the Company) to take down and remove all poles, wires and cables of said Company which may be above ground in violation of the provision of this ordinance, or place such cables and wires under ground."

In our opinion the commissioner of public works has the authority, under the above quoted provisions of the ordinance referred to, to order any poles of the Chicago Telephone Company now standing in the alleys in question and any cables or wires of said Chicago Telephone Company which are attached to such poles to be removed from said alleys. If the same shall not be removed upon receipt of such order by the Chicago Telephone Company then the Department of Public Works has the right, at the expense of the Chicago Telephone Company, to take down and remove all such poles, wires and cables of said company.

There is no provision in the ordinance of February 20, 1899 granted to the Illinois Telephone and Telegraph Company or in the ordinance granted to said company July 15, 1903, as amended July 20, 1903, February 1, 1909, and June 28, 1909, under which ordinances the Chicago Tunnel Company, purchaser, at foreclosure sale of the property and franchises of the Illinois Tunnel Company, is operating its telephone business, which authorizes the commissioner of public works to order the removal of or to remove from any street or alley the poles, wires, conductors or cables of the company.

We are, therefore, of the opinion that the commissioner of public works has not, without action by the city council, authority or power to order the removal or to remove from the alleys in question the poles of the Chicago Tunnel Company.

Section 3 of the aforesaid ordinance of July 15, 1903 is in part as follows:

"All wires of the company strung on poles in the streets and alleys of the City shall be removed and placed in tunnels in all streets or alleys in which the company shall construct its tunnels, and whenever the City shall require the wires of said company on any street or alley, or part thereof, to be placed under ground, said

Illinois Telephone and Telegraph Company shall promptly comply with such requirement."

We are of the opinion that under this provision of the ordinance the city council has the right to require the wires of the Chicago Tunnel Company now strung on its poles in the alleys in question to be placed under ground and to require the company's poles in said alleys to be removed.

Section 2500 of The Chicago Code of 1911, as it originally read and as amended July 21, 1913, forbids the erection, construction, maintenance or use of any pole, line or wire, or electric conductor of any description whatever within the city, without a permit having first been obtained therefor under a valid and existing ordinance from the commissioner of public works, which permit shall be countersigned by the city electrician.

Said Section 2500 is substantially a re-enactment of Section 1902 of The Revised Code of Chicago of 1897 and of Section 2166 of The Revised Municipal Code of Chicago of 1905.

Section 2503 of The Chicago Code of 1911 is in part as follows:

"No permission or authority shall be given to any person or corporation to erect any pole, or poles, for telegraph, telephone or electric light or power purposes, or for the purpose of stringing thereon wires, cables or conveyors for the transmission of sound or signal, or of heat, light or power, upon or along any street, alley or public way, within the present city limits, except upon the express provision that such poles and conductors are to be and will be removed forthwith whenever the city council shall order such removal; * * *."

Said Section 2503 is substantially a re-enactment of Section 2169 of The Revised Municipal Code of Chicago of 1905.

We are of the opinion that if the poles of the Chicago Tunnel Company now standing in the alleys in question were erected under permits containing the provisions found in said Section 2503 or said Section 2169 in respect to removal of the poles, then the city council can, if it sees fit, order the removal of the poles.

There is no provision in the ordinance granted to the Commonwealth Electric Company, June 28, 1897, as amended

March 23, 1908, under which ordinance as amended the Commonwealth Edison Company is operating, which authorizes the commissioner of public works to order the removal of or to remove from any street or alley the poles, wires, conductors and cables of the company, erected under permits issued by the commissioner of public works.

We are, therefore, of the opinion that the commissioner of public works has not, without action by the city council, the power to order the removal of or to remove from the alleys in question the poles, if any, of the Commonwealth Edison Company.

The opinion hereinabove expressed in regard to the power of the city council to order the removal of the poles and wires of the Chicago Tunnel Company when erected under permits granted pursuant to Sections 2500 and 2503 of The Chicago Code of 1911 or Sections 2166 and 2169 of The Revised Municipal Code of Chicago of 1905, applies to the poles, wires and cables of the Commonwealth Edison Company and the Chicago Telephone Company, as well as the poles, wires and cables of the Chicago Tunnel Company.

In the foregoing opinion we have considered only the existing ordinances and have not dealt with the question of the authority of the city under its police power to pass an ordinance or ordinances requiring the removal from its streets or alleys of poles, wires and overhead construction of telephone companies, electric light companies or similar companies.

Yours very truly,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 25, 1914.

HON. RAY PALMER, Commissioner of Gas and Electricity.

Dear Sir:

We are in receipt of your communication of the 26th ult., inquiring whether a valid contract can be made between the City and the Northwest Park District whereby the city's

poles, wires and equipment, which are now maintained for electric street lighting on Springfield avenue between Dickens avenue and Armitage avenue, can be moved and used for lighting a certain portion of the park property controlled by said park district, said park district to pay the expense of moving the poles and the cost of operation and maintenance of such lights.

It appears from your communication that until recently Springfield avenue at the location in question was a city street and has been lighted by the City; that recently the Northwest Park District procured the vacation of Springfield avenue at this point and that the vacated portion of street aforesaid is now incorporated into and forms a part of a small park bounded by the C. M. & St. P. R. R. right-of-way, Dickens avenue, Avers avenue and Armitage avenue, which park is under the control of said park district.

It further appears that the park commissioners desire to have the poles, wires and equipment which now stand on or near the west side of what was Springfield avenue before it was vacated, moved to a line near what was the east line of said Springfield avenue.

The question raised are whether the City can lawfully furnish the lights to the Park District on the basis of the district paying for the cost of operation and maintenance, and also whether the City can lawfully move the poles, wires and equipment at the expense of the District and use them for furnishing the lights in question.

The Act of May 18, 1905 confers upon the City of Chicago power to sell surplus electricity. The Act does not attempt to define surplus electricity, but it may reasonably be assumed that where the City has available from any source a supply of electricity for a given district in excess of what is required for strictly city uses, such excess may be regarded as surplus and sold by the City. The terms upon which it shall be sold is a matter within the discretion of the city council.

We are of the opinion that the City has the power to furnish the electricity to the Park District on the terms mentioned in your communication.

In regard to the removal of the City's poles, wires and

equipment and use thereof, it appears that the compensation to be paid by the Park District is to cover not only cost of electricity but all cost of operation and maintenance of the lights. We understand that this will include depreciation on all property used and interest on the investment therein. The poles, wires and equipment will continue to be the property of the City, and their use under the circumstances and for the purpose specified may properly be considered as incidental to the sale of the electricity. There is no reason why the City should not perform the work of moving the poles, etc., the same being done at the expense of the Park District.

We are accordingly of the opinion that a valid contract can be made between the City and the Park District on the basis outlined in your letter.

Ordinances should be passed by the city council and the board of commissioners of the Northwest Park District authorizing the entering into and execution of said contract.

Yours very truly,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

SEPTEMBER 28, 1914.

DR. GEORGE B. YOUNG, Commissioner of Health.

Dear Sir:

I have your communication of September 23 requesting an opinion from this department relative to the enforcement of certain contracts where the contractors claim they are unable to make deliveries on account of the European war, and whether the City of Chicago can hold persons and firms with whom they have contracts for the importation of goods from abroad liable for failure to comply with the provisions of their contracts.

As a general proposition in law, only the acts of God are sufficient to excuse the performance of a private contract.

The fact of the existence of the present European war does not render performance of said contracts impossible be-

cause there has been no change in the political situation of the United States with any other power.

Atkinson v. Ritchie, 10 East 530.

Addison on Contracts (9 Ed.) 132.

Where the party by his own contract creates a duty or charge upon himself, he is bound to make it good notwithstanding any accident, by inevitable necessity, because he might have provided against it by his own contract. This has sometimes been construed to mean that the promisor is answerable in damages where the performance of his promise has become impossible by the act of God, and sometimes that he is answerable where performance has not become impossible but only more burdensome. It might be the result of the peculiar state of the market, and in no wise attributable to the difficulties to be encumbered by reason of the war; but, from whatever cause the result, it is a sufficient answer, that the courts must enforce contracts as the parties make them. They must not superadd conditions or restrictions, which the parties have not thought fit to impose in making their contract.

Article IX of said contracts with the Commissioner of Health reads as follows:

“Should the contractor fail to deliver the goods as herein specified, the Commissioner of Health, at his option, may cancel the then unexpired portion of the contract, or he may purchase supplies in the open market, in which case, all costs and expenses in excess of the price bid shall be borne and paid for by the said contractor.”

It is, therefore, my opinion that Article IX is now in full force and effect. First, that the Commissioner of Health may cancel the unexpired portion of the contract and purchase in the open market, or the Commissioner may purchase supplies in the open market to such an amount as the contractor has failed to deliver and hold the contractor liable for any excess paid as to purchase price. Second, the Com-

missioner should give the contractor notice as to his intention of pursuing either course.

Very truly yours,

J. EDWARD CLANCY,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

SEPTEMBER 30, 1914.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

We are in receipt of your favor of the 22nd ultimo, transmitting a letter from H. McClure Johnson, relative to the payment of interest on water pipe extension certificates.

You ask our opinion as to the effect of a recent Supreme Court decision on such matters. It appears from this letter that the attorney holds for collection the following instrument:

"City of Chicago, No. 1085.
Department of Public Works,
Bureau of Engineering..

September 17th, 1902.

It is hereby certified, that J. C. Scales has advanced the sum of Two hundred sixty-six and 25/100 Dollars, for the purpose of laying Five hundred ten feet of 6"-510' water pipe in Kenesaw Terrace from Hazel St. to Clarendon Ave., which amount will be refunded to him (without interest if so refunded within two years from the date hereof, but with interest at the rate of five per cent. per annum from and after the expiration of said two years if not so refunded within said two years from any money belonging to the Water Tax Fund in the City Treasury not otherwise appropriated, whenever upon a proper survey it is shown that a revenue from frontage water rates of ten (10) cents per lineal foot per annum is being derived from said pipe.

BY ORDER OF THE COMMISSIONER.

W. F. BRENNAN, *Dept. Com.*
\$266-25/100 JOHN ERICSON, *City Engineer.*"

These attorneys now want to collect the principal and interest, in view of the decision referred to. The question is

whether, under this decision, the city is liable for interest, and if so from what date.

The council on November 2, 1891 (Journal of the City Council p. 1007), passed an ordinance authorizing the commissioner of public works to extend water mains when the property owners advanced the cost of same, and that money so advanced should be repaid from the surplus of the net income of the water rate.

On May 16, 1892 (Journal of the City Council, p. 165), the council passed the following ordinance:-

“An ordinance providing for the laying of Water Mains. Whereas there is an urgent demand from every section of the city for street improvements and whereas it will be impossible to proceed with any of the streets now under assessment until proper provision is made for the extension of water mains; and whereas, this council has recently authorized the issuance of water certificates amounting to \$1,000,000, the proceeds of which were to be used in extending and improving the water system; and whereas, it is of the utmost importance that no part of the proceeds of said certificates be used except for the extension of water mains in localities where the actual number of residents will warrant the outlay from a business standpoint; and whereas in the past it has been the practice to pass ordinances for street improvements in uninhabited subdivisions, which said ordinances were promptly repealed when the water pipe was laid; now therefore:

“BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO; Sec. 1. That whenever an ordinance is hereafter passed by this council for the filling, grading, curbing and paving of any street, it shall be the duty of the commissioner of public works to ascertain whether the street or streets on which said improvement is ordered contains a sufficient number of houses to pay a revenue to the City of ten (10) cents per lineal foot for every foot of water pipe laid on said street or streets, when, if such be the case, he shall at once proceed under the ordinance to lay the necessary water mains. If upon such examination it is ascertained that a revenue of ten (10) cents per lineal foot cannot be derived, the owners of property abutting on said street or streets shall be required to advance the money necessary to cover the cost of all pipe laid on every such street or streets, which said cost shall include the purchase, delivery and laying;

provided that where water pipe is now on the ground the same shall be laid underground.

"Sec. 2. The moneys advanced by owners of property for the laying of water mains as provided in Section 1 shall be returned by the City from moneys not otherwise appropriated whenever upon a proper survey it is shown that a revenue of ten (10) cents per lineal foot is being derived therefrom; provided that if the money so advanced is not paid back within two years that interest at the rate of 5 per cent. per annum shall be allowed after the expiration of two years until paid.

"Sec. 3. All ordinances or parts of ordinances in conflict herewith are repealed."

On July 25, 1892, another ordinance was passed (Journal of the City Council, p. 918), providing that if any special assessments for the purpose of extending any water main should be collected by the city the holder of the receipt therefor should be repaid such money from the surplus of the net income from the water rates under certain conditions.

Section 2128 of The Chicago Code of 1911 is on the point herein and is as follows:

"COST ADVANCED BY PROPERTY OWNERS.] The commissioner of public works may extend water mains where owners of the property, or persons desiring such extension, shall advance and pay into the city treasury a sum of money equal to the entire cost thereof; and whenever, upon a proper survey, it is shown that a permanent annual revenue of ten cents per lineal foot is being derived from such water mains so laid, then such money so advanced as aforesaid shall be repaid to the person or persons so advancing the same; provided, however, if the money so advanced is not paid back within two years, interest at the rate of three and one-half per cent. per annum shall be allowed after the expiration of said two years, until paid."

The case above referred to is entitled, *The Merchants Loan & Trust Company v. City of Chicago*, No. 9387, and was decided June 16, 1914, by our Supreme Court. The decision passes squarely on the point at issue, and the court holds that the city is liable for interest from the expiration of the two year period whether there is sufficient revenue derived to pay it or not.

The certificate in question in that case is an exact copy

of the certificate involved herein. The Supreme Court, among other things, said the following:

“Counsel for the plaintiff in error concede that the city should pay the principal of such certificate but deny that it is liable for the amount of interest found by the trial court. They first contend that the ordinance means that the interest shall only begin to run from the date when it is shown by a proper certificate ‘that a revenue from frontage water rates of ten cents per lineal foot per annum is being derived from said pipe.’ No such construction can be put on the certificate given by the city to Lambert Tree, read by itself, for that says, ‘two years from the date hereof,’ which obviously means from the date of the certificate. The ordinance provides that ‘if the moneys so advanced are not paid back within two years, that interest * * * shall be allowed after the expiration of two years until paid.’ The fundamental object in construing an ordinance or statute is to find the intention which the legislative body that passed it had as to its meaning. The plain and unambiguous meaning of this provision of the ordinance is that the interest begins to run two years after the money is advanced. Any other construction would put a strained and unnatural meaning upon the language used in the proviso. The city officials have heretofore placed this construction upon this portion of these various ordinances.”

The court further held that while there is no implied liability for interest as against a municipal corporation, such liability may be incurred by contract. The court further said:

“It is clear, also, from the reading of the various sections of this statute (Hurd’s Revised Statute 1913, p. 337) especially Sections 2 and 6 that the legislature intended that a municipality could borrow money for the purpose of constructing the water-works and pay for the same by general taxation or from the funds collected from water taxes, rents or rates. Furthermore, there can be no question that if the city is liable for the principal of this certificate it must also be held liable for any interest due under the terms of the ordinance and the express agreement given to Lambert Tree, upon which this suit is based.

* * * Under the statutes and the constant practice of government officials it is manifest that to require the city to pay the interest in accordance with the terms of its express agreement is not contrary to public policy.

The judgment of the Appellate Court (182 App. 298) will be affirmed.”

Under this decision, therefore, we are of the opinion that the city is liable for the principal and interest two years after the advancement of the money whenever a proper survey shows the required ten cents per lineal foot as provided by the ordinance.

Yours very truly,

A. L. GETTYS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel.

OCTOBER 2, 1914.

HON. L. D. SITTS, Chairman, Committee on Gas, Oil and
Electric Light.

Dear Sir:

We are in receipt of a communication from the Honorable Francis D. Connery, City Clerk, conveying a request of your committee for an opinion as to whether the City of Chicago can take advantage of the forfeiture clause contained in the ordinance granted to the Illinois Telephone and Telegraph Company, in the event that the Chicago Tunnel Company, operating under said ordinance, does not now have the number of *bona fide* telephone subscribers required by the terms of said ordinances.

It may be considered as established by the authorities that if an ordinance granted by a city to a public service company authorizing such company to use the streets of the city for the installation of its equipment and the operation of its system, expressly provides in clear and unequivocal terms for forfeiture of the rights granted by the ordinance upon the failure of the company to comply with conditions specified in the ordinance, then such rights may be forfeited if the company fails to comply with the conditions specified.

City of Belleville v. Railway Company, 152 Ill. 171.

Blocki v. People, 220 Ill. 444.

People v. Central Union Tel. Co., 232 Ill. 260.

Wheeling, etc. R. R. Co. v. Triadelphia, 58 W. Va. 487.

Union St. Ry. Co. v. Snow, 113 Mich. 694.

Pacific R. R. Co. v. Leavenworth, 1 Dill. 393.

It therefore becomes necessary to consider the provisions of the ordinance under which the company is operating relating to the forfeiture of its telephone system rights and its plant and equipment for telephone purposes.

The first ordinance granted to the Illinois Telephone and Telegraph Company was passed February 20, 1899. By this ordinance the company was granted permission to construct and operate in the streets, etc., of the City of Chicago for the term of thirty years a telephone system.

On July 15, 1903, a second ordinance was passed granting to said company permission to construct and operate in and through the tunnels which had been constructed under the terms of the said ordinance of February 20, 1899, or which should thereafter be constructed under said ordinance of July 15, 1903, or under the ordinance of February 20, 1899, for and during the term of said ordinance of February 20, 1899, not only wires and electrical conductors as provided in said last mentioned ordinance, but also any appliance or apparatus for the transmission or transportation of newspapers, mail matter, packages, parcels or merchandise.

Section 11 of said ordinance of July 15, 1903 provided that the company should, under certain conditions, forfeit all rights acquired under said ordinance, together with its plant and equipment for transportation purposes, and that the company, under certain conditions, should also forfeit to the city all rights acquired under said ordinance of February 20, 1899, together with its plant and equipment for telephone purposes.

On February 1, 1909, an ordinance was passed amending Section 11 of the said ordinance passed July 15, 1903.

On June 28, 1909, an ordinance was passed amending said Section 11 of the ordinance passed July 15, 1903, as amended by an ordinance passed July 20, 1903, and by said ordinance passed February 1, 1909. Section 11 as amended by the said ordinance passed June 28, 1909, and which has continued in force and effect until the present time, is in part as follows:

“SECTION 11. * * *

“If said company, its successors and assigns, shall fail to construct or shall cease to operate fifty (50) miles of such tunnels within ten years from the time this ordinance goes into effect, then and in that case said company, its successors and assigns, shall also forfeit to the city all rights acquired under this ordinance, together with its plant and equipment, for transportation purposes then installed; and if said company, its successors and assigns, shall fail to construct, equip and install a telephone system under the terms of said ordinance to said company of February 20, 1899, adequate for the services of 20,000 subscribers prior to June 1st, 1911, or if at any time after said June 1st, 1911, said company, its successors and assigns shall not have in operation or shall cease to operate a telephone system serving 20,000 *bona fide* subscribers, then and in each case said company, its successors and assigns, shall also forfeit to the city, or to any licensee or grantee of the city (designated or authorized by the city for this purpose), all rights acquired under said ordinance of February 20, 1899, together with its plant and equipment for telephone purposes, and shall forthwith turn over the ownership and possession of said plant and equipment to the city, or to any licensee or grantee of the city (designated or authorized by the city for this purpose), and shall be under obligations to furnish the city, or to any licensee or grantee of the city (designated or authorized by the city for this purpose) without charge, all space in any or all of its tunnels and conduits necessary for the carrying on of said telephone business; such space at no time to be less than that required to reasonably accommodate equipment for the service of 20,000 telephone subscribers; provided, however, that nothing herein contained shall impair the obligation of said company under said ordinance of February 20, 1899, to construct and have in operation within five (5) years from the date of said ordinance of February 20, 1899, a telephone exchange serving two thousand (2,000) telephones, or shall vary the provisions of forfeiture therein contained except as herein expressly provided.

* * * * *

This ordinance, so far as it conflicts with or varies from the provisions of the said ordinance of February 20, 1899, or of said ordinance of July 15, 1903, or of said ordinance of July 20, 1903, or of said ordinance of February 1, 1909, shall be taken and construed as and is

hereby declared to be amendatory of said ordinances, respectively.”

Section 11 of the ordinance of July 15, 1903, as amended, and hereinabove quoted from, provides that the company shall forfeit all rights acquired under the ordinance of February 20, 1899, (the telephone-system grant), together with the plant and equipment for telephone purposes:

(a) “if said company, its successors and assigns, shall fail to construct, equip and install a telephone system under the terms of said ordinance to said company of February 20, 1899, adequate for the services of 20,000 subscribers prior to June 1st, 1911,”

or

(b) “if at any time after said June 1st, 1911, said company, its successors and assigns, shall not have in operation or shall cease to operate a telephone system serving 20,000 *bona fide* subscribers, * * *.”

It will be observed that the first clause refers to the construction and installation of the telephone system, and provides for forfeiture if the company fails to have installed “a telephone system under the terms of said ordinance to said company of February 20, 1899, *adequate for the services of 20,000 subscribers*” prior to June 1st, 1911; and the second clause refers to the operation of the telephone system and provides for forfeiture if, at any time after June 1st, 1911, the company “shall not have in operation or shall cease to operate a telephone system *serving 20,000 bona fide subscribers.*”

The inquiry before us concerns the second clause above referred to, that is, the clause in respect to a forfeiture in the event that the company at any time after June 1, 1911 shall not have in operation or shall cease to operate a telephone system serving 20,000 *bona fide* subscribers.

If this clause be interpreted in accordance with what we consider to be the most natural meaning of the words employed, the context also being considered, it would in our opinion mean that the grantee company, its successors and assigns, shall forfeit to the city all rights acquired under said ordinance of February 20, 1899 (the telephone system grant), together with its plant and equipment for telephone purposes, if at any time after June 1, 1911 said company did not have in operation a telephone system serving 20,000 *bona fide* sub-

scribers whose subscription contracts were in force and who had instruments and wires in their residences or places of business at all times ready for their use.

Counsel for the Chicago Tunnel Company in their printed opinions heretofore filed with your committee invoke the rule that the law does not favor, and equity abhors, a forfeiture, and that therefore the words of a forfeiture clause should be construed so as to avoid a forfeiture if it is reasonably possible so to do, and will not be construed so as to permit a forfeiture if reasonably susceptible of any other meaning. Counsel then contend that the language used in the forfeiture clause in question is susceptible of two meanings, one of which may be that hereinabove expressed, but the other of which would justify a forfeiture only in the event that the company at any time after June 1, 1911 should not have in operation or should cease to operate a telephone system *sufficient and effective* for the service of 20,000 *bona fide* subscribers.

The construction suggested would not require the company to have 20,000 *bona fide* subscribers and a telephone system serving said 20,000 *bona fide* subscribers, but merely to have a telephone system which was *sufficient and effective* for the service of 20,000 *bona fide* subscribers, if such number of subscribers should desire to avail themselves of it.

The two different constructions turn upon the meaning given to the word "serving" as used in the forfeiture clause in question. The dictionaries give various meanings of the word "serve." Webster gives as one of the meanings of the transitive verb "serve"—"to be sufficient for," and of the intransitive verb one of his definitions is "to be of use; to answer a purpose; to suffice"; the word "serve" in its transitive sense is defined in the Century Dictionary as "to suffice" and "to be of use or service to; answer the requirements of," and in its intransitive sense the meanings are given "be sufficient; suffice; suit" and "to be convenient." The Standard Dictionary gives as one of the meanings of the verb "serve" in its intransitive sense "to be sufficient and effective for a purpose." The New English Dictionary published in Oxford in 1914 gives as one of the meanings of the intransitive verb "to be usable or available for."

That the word "serving" is susceptible of the meaning contended for by counsel for the company must be regarded as settled by the definitions given in the dictionaries. An application of this meaning to the word "serving" as used in the clause in question does not make the clause unintelligible or irrational, but, on the contrary, leaves its meaning clear and rational.

It is a maxim familiar to the legal profession that the law does not favor, and equity abhors, a forfeiture. The doctrine which has been crystallized into said maxim finds an application in the rule of construction which the courts, in pursuance of the general policy of avoidance of forfeitures where possible, apply in the interpretation of forfeiture clauses of contracts. The rule is stated in 17 A. & E. Ency. L. (2nd Ed.) p. 18 in the following terms:

"A writing will be construed so as to avoid a forfeiture of rights thereunder, since forfeitures are not favored in the law."

The rule of construction as applied to cases where the terms of a contract in respect to forfeiture are susceptible of two meanings, is succinctly stated by the Supreme Court of Wisconsin in its opinion rendered in the case of *Jacobs v. Spalding*, 71 Wis. 177, 190, as follows:

"When the terms of a contract are indefinite, uncertain, and susceptible of two constructions, and by giving them one construction one of the parties would be subjected to a forfeiture, and by giving them the other no such forfeiture would be incurred and no injustice would be done to the other party, the contract should be so construed as not to create the forfeiture."

This rule of construction is universally recognized and applied and must be accepted as the settled rule upon the subject.

We are of the opinion that the forfeiture clause in question, if interpreted in accordance with what we consider to be the most natural meaning of the words employed, the context also being considered, would mean that the company shall forfeit to the city all rights acquired under said ordinance of February 20, 1899, together with its plant and equipment for telephone purposes if at any time after June 1, 1911 it

shall not have in operation or shall cease to operate a telephone system serving 20,000 *bona fide* subscribers who have instruments and wires in their residences or places of business at all times ready for their use.

We, are, however, also of the opinion that the language of the forfeiture clause in question is susceptible of two meanings, one of which is that just stated, and the other of which is that the company shall forfeit to the city all rights acquired under said ordinance of February 20, 1899, together with its plant and equipment for telephone purposes only if the company at any time after June 1, 1911 shall not have in operation or shall cease to operate a telephone system *sufficient* and *effective* for the service of 20,000 *bona fide* subscribers.

The forfeiture clause, therefore, being, in our opinion, susceptible of the two meanings above indicated, one of which (assuming that the company does not now have 20,000 *bona fide* subscribers) would permit a forfeiture, and the other of which (assuming that the company now has, and ever since June 1, 1911, has had, in operation a telephone system sufficient and effective for the service of 20,000 *bona fide* subscribers) would avoid a forfeiture, we are of the opinion that the courts, applying the above stated rule governing the interpretation of words susceptible of two meanings found in a forfeiture clause, would in all probability adopt that interpretation of the forfeiture clause in question which would not permit a forfeiture.

Yours respectfully,

BRYAN Y. CRAIG,

Assistant Corporation Counsel.

JOHN W. BECKWITH,

First Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

OCTOBER 5, 1914.

JULIUS W. MUELLER, Esq.,
3625 N. Springfield Avenue,
Chicago.

Dear Sir:

In answer to your letter of the 30th ult., with reference to building restrictions, I wish to say that the latest decision of our Supreme Court on the subject is the case of *People ex rel. Friend, Defendant in Error v. The City of Chicago, Plaintiff in Error*, 261 Ill. 16.

In this case the city attempted to enforce an ordinance which provided that frontage consents should be necessary for the location of a retail store in any block in which all the buildings are used exclusively for residence purposes.

In said decision you will find enumerated the clauses of the City Charter which confer jurisdiction upon the city council over various business enterprises, and it appears natural that said powers cannot be extended to embrace any other classes of business than those there named.

It is one of the fundamental principles of our constitution that private property rights cannot be interfered with for purely aesthetic reasons, under the police power of the state.

You will likewise see from said decision that the classes of business over which the city council has jurisdiction are practically the same as those found in the newspaper article you had the kindness to transmit with your communication.

It is true that building restrictions may be established by agreement of property owners, and whenever it appears that conditions have not undergone a vital change, they will be enforced in a court of equity.

See *Hartman v. Wells et al.*, 257 Ill.

The principle that private property shall not be taken or damaged for public use without due compensation being made therefor, has resulted in a very decided opinion against the establishment of building lines by municipal authority without the consent of all the property owners fronting on a street.

See—

Enbank v. City of Richmond, 226 U. S. 137.

Wilson v. Cooke, (Colorado) 44 L. R. A. (new series), 1030.

The police power of the state may be exercised in cases where the health, safety and welfare of the public is directly involved, but not otherwise.

Very truly yours,

NICHOLAS MICHELS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Corporation Counsel.

The following is a part of an opinion omitted from page 725 *infra*.

Under the law, a special assessment is made a lien on the property for five years from the date of the confirmation of the judgment, and when the special assessment is made payable in installments the lien continues for a period of five years from the date of the maturity of the last installment.

The local improvement act authorizes the city to levy a supplemental assessment on property whereon the special assessment theretofore levied has not been paid. Of course, the levy of such a supplemental assessment would not be of any greater force or effect than the original assessment except to continue the lien in force for a period of five years from the date of the rendition of the supplemental assessment, and in cases where the supplemental assessment was made payable in five or ten installments the lien thereof would, of course, be operative for five or ten years, as the case may be, from the maturity of the last installment.

The local improvement act empowers the municipality to bring an action in debt for the recovery of the special assessment which has been levied and which has not been paid. The act also empowers a municipality to file a bill in equity to foreclose for the amount due on a special assessment in the same manner that the county is now foreclosing for all general taxes due on property.

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